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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

DEAN H. CALHOON, as Commissioner of the Department of Labor for the State of Oklahoma; and THE DEPARTMENT OF LABOR FOR THE STATE OF OKLAHOMA,

Petitioners,

v.

NATIONAL ELEVATOR INDUSTRY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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June, 1992
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QUESTIONS PRESENTED

Oklahoma law provides that workmen on public works projects must be paid no less than the prevailing hourly wage for work of a similar character in the locality in which the work is performed. Pursuant to state prevailing wage laws, Oklahoma's Labor Commissioner issued a declaratory ruling that only workmen in training programs approved as apprenticeship programs by the United States Department of Labor may be paid at wage rates less than the journeyman rate for work performed on state public works projects. The questions presented are:

1. Whether, since federal law encourages the formulation of labor standards for apprentices, ERISA's savings clause for federal laws protects from preemption a state's determination that employees in a training program may be paid

less than journeymen wage rates only if the training program is approved as an apprenticeship program by the United States Department of Labor.

2. Whether, as the Tenth Circuit held, a state law concerning the wage rate that may be paid to a certain category of workmen on public works projects relates to an employee welfare benefit plan such that the state law is preempted by ERISA.

PARTIES TO THE PROCEEDINGS

The Petitioner, Dean H. Calhoon, formerly served as Commissioner for the Department of Labor for the State of Oklahoma. Mr. Calhoon issued the December 22, 1989, Declaratory Ruling at issue in the instant case. Petitioner, the Department of Labor for the State of Oklahoma, is the state agency responsible for enforcing Oklahoma's labor laws.

The Respondent is the National Elevator Industry, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners Dean H. Calhoon, the former Commissioner of the Department of Labor for the State of Oklahoma, and the Department of Labor for the State of Oklahoma, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Tenth Circuit is published at 957 F.2d 1555 and has been reprinted as Appendix A in the appendix to this certiorari petition. The decision of the United States District Court for the Western District of Oklahoma was not published, but it is reprinted as Appendix B. The December 22, 1989, Declaratory Ruling issued by Petitioner Calhoon is reprinted as Appendix C.

JURISDICTION

The order and judgment of the Tenth Circuit were entered on February 26, 1992. No petitions for rehearing were filed. On May 13, 1992, Justice White extended the time for filing a petition for writ of certiorari to and including June 26, 1992.

The district court had jurisdiction over this matter under 28 U.S.C. § 1331. The Tenth Circuit had jurisdiction under 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves §§ 3(1) and 514 of the Employee Retirement Income Security Act (ERISA), as amended, 29 U.S.C. §§ 1144 and 1002(1); regulations promulgated pursuant to ERISA, 29 C.F.R.

§ 2510.3-1(b); the National Apprenticeship Act of 1937 (the Fitzgerald Act), 29 U.S.C. § 50; regulations promulgated pursuant to the Fitzgerald Act, 29 C.F.R. §§ 29.1 et seq.; Oklahoma's prevailing wage law, Okla. Stat. tit. 40, §§ 196.1, (1991) et seq.; and regulations promulgated pursuant to Oklahoma's prevailing wage law. The relevant statutes and rules are reprinted in Appendix D.

STATEMENT OF THE CASE

This dispute concerns the appropriate rate of wages to be paid to a particular category of workmen, elevator mechanics' helpers, on public works projects funded by the state of Oklahoma. Oklahoma has enacted a series of statutes that provide that all workmen employed on behalf of public bodies shall be paid a

wage of no less than the prevailing hourly rate of wages for work of a similar character in the locality in which the work is performed. Okla. Stat. tit 40, § 196.1 (1991). Oklahoma's prevailing wage law further provides that "[n]othing in this act shall prevent the employment of registered apprentices or trainees. . . ." Okla. Stat. tit. 40, § 196.10a (1991). An apprentice/trainee is defined as "a workman in a craft or trade who is approved for participation in an apprenticeship or trainee program approved by the Bureau of Apprenticeship Training of the United States Department of Labor." Okla. Stat. tit. 40, § 196.2(9) (1991).

Oklahoma's Labor Commissioner has promulgated a series of rules that

clarify the kind of workmen who will be deemed apprentices for the purposes of determining wage rates on public works projects. Rule 7 of the Commissioner's prevailing wage rules provides, in part:

> Journeyman's rate of pay will be paid to all workers employed on prevailing wage projects except "Apprentices" or "Trainees" enrolled and participating in "Apprentice" or "Trainee" programs registered with the U.S. Department of Labor's Bureau of Apprenticeship and Training.

Rule 8 of the Commissioner's Prevailing Wage Rules states, "'Helper' as a classification of worker shall not be recognized by the Oklahoma Department of Labor."

In August, 1989, Respondent the National Elevator Industry, Inc. (NEII), a trade association that represents employers engaged in constructing,

repairing, and servicing elevators, escalators, dumbwaiters, and moving walkways, filed a Petition for Declaratory Ruling with the Oklahoma Department of Labor. NEII requested the Labor Department to find that elevator mechanic's helpers should be paid the wage rate for such helpers that has been established by the United States Department of Labor for federally funded public works projects in particular geographical areas of Oklahoma. That wage rate is set at 70% of the wage rate for mechanics (50% for helpers with less than six months experience). In support of its Petition, NEII presented materials regarding its training program for elevator mechanics' helpers.

On December 22, 1989, Commissioner Calhoon issued a ruling denying NEII's

request. Commissioner Calhoon concluded that elevator mechanics' helpers did not constitute a discrete kind of worker. He observed that, by NEII's own description, "an elevator constructor helper may have anywhere from one (1) day's experience to twenty (20) or more years of experience." He further explained that, although NEII characterized these helpers as trainees and apprentices, there was no indication in the record that NEII's program had been approved by the Bureau of Apprenticeship Training of the United States Department of Labor (the BAT). The Commissioner noted that, under Okla. Stat. tit. 40, § 196.2(9) (1991), such approval was required before apprentices and trainees could be recognized on public works projects in Oklahoma.

As a result, Commissioner Calhoon concluded that "should the elevator constructor helper educational program be accepted by the Bureau of Apprenticeship Training, then we will accept elevator constructor helpers as a trainee/apprentice under that program regardless of how the industry chooses to refer to them." Until such recognition, the Commissioner found, elevator mechanics' helpers would not be entitled to recognition under the Oklahoma laws regarding wages on public works projects. Therefore, under the Commissioner's Declaratory Ruling, until BAT approval of the NEII educational program, elevator mechanics' helpers would receive the same higher wages as elevator mechanics for work performed on Oklahoma public works projects.

Following the issuance of this Declaratory Ruling, NEII filed an action against the Oklahoma Department of Labor and Commissioner Calhoon in the United States District Court for the Western District of Oklahoma. In its Complaint, NEII asserted that the Commissioner's Declaratory Ruling was preempted by ERISA and the National Labor Relations Act, 29 U.S.C. § 151. NEII also asserted several pendent state claims.

Subsequently, the Oklahoma Department of Labor and Commissioner Calhoon moved to dismiss NEII's complaint. On May 31, 1990, the district court granted this motion. As to ERISA, the district court found that the Commissioner's Declaratory Ruling was saved from preemption by ERISA's federal savings clause, 29 U.S.C. § 1144(d). As to the

National Labor Relations Act, the court found that the declaratory ruling constituted a minimum labor standard independent of the collective bargaining process and thus not preempted. The district court also found that NEII's pendent state claims were barred by the Eleventh Amendment.

NEII appealed the district court's ruling to the Tenth Circuit Court of Appeals. In its February 26, 1992 opinion, the Tenth Circuit reversed the district court's decision. The Tenth Circuit found that the Commissioner's declaratory ruling related to an employee welfare benefit plan (i.e., NEII's training program for elevator mechanics' helpers), and was thus preempted by ERISA. The Tenth Circuit further found that the Commissioner's

Declaratory Ruling was not protected from preemption by ERISA's federal savings clause. In light of its finding of ERISA preemption, the Tenth Circuit did not consider NEII's National Labor Relations Act claim or the pendent state claims.

REASONS FOR GRANTING THE WRIT

Last Term, this Court observed that, when considering whether federal laws preempt state laws, the courts should "start with the assumption that the historic police powers of the states [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Wisconsin Public Intervenor v. Mortier, 111 S.Ct. 2476, 2482 (1991), quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). By reading

ERISA's preemption provision too broadly, the Tenth Circuit's decision controverts that basic principle. This Court should grant this petition for the reasons set forth below.

I.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE NINTH AND TENTH CIRCUIT COURTS OF APPEALS REGARDING THE APPLICATION OF ERISA'S SAVINGS CLAUSE TO STATE REGULATION OF EMPLOYEE TRAINING PROGRAMS.

In this case, the Tenth Circuit concluded that the Oklahoma Labor Commissioner's Declaratory Ruling was not protected from preemption by ERISA's federal savings clause, 29 U.S.C. § 1144(d). In spite of the fact that the Commissioner's ruling required United States Department of Labor approval of NEII's training program as a prerequisite to the payment of less than

journeymen wage rates to elevator mechanics' helpers, the Tenth Circuit found that preemption of the Commissioner's ruling would not impair, modify, or supersede any other federal law. In Electrical Joint Apprenticeship Committee v. MacDonald, 949 F.2d 270 (9th Cir. 1991), petition for certiorari filed, 60 U.S.L.W. 3655 (Feb. 3, 1992) (No. 91-1416), the Ninth Circuit reached the opposite conclusion. This Court should grant certiorari to resolve this fundamental conflict concerning the interpretation of ERISA's savings clause and the states' regulation of wage rates on public works projects.

The Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq., is a comprehensive statute "designed to promote the interests of

employees and their beneficiaries in employee benefit plans." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983). Although ERISA does not mandate particular benefits, it imposes participation, funding and vesting requirements and establishes standards for reporting, disclosure, and fiduciary responsibility. Under 29 U.S.C. § 1002(1), "apprenticeship or other training programs" constitute employee benefit plans subject to ERISA's provisions.

ERISA contains a general preemption provision, 29 U.S.C. § 1144(a), which states, in part, that its provisions "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan. . . " However, ERISA also contains a

federal savings clause, 29 U.S.C. § 1144(d), which states, in part:

> Nothing in the subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States. . . or any regulation or rule issued under any such law.

In this instance, federal law directly addresses one of the matters with which the Commissioner's Declaratory Ruling is concerned: the formulation of labor standards regarding the employment of apprentices. The Fitzgerald Act, 29 U.S.C. § 50 provides:

> The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and laborers for the formulation of programs of apprenticeship, to cooperate with State

> agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Office of Education under the Department of Health, Education and Welfare in accordance with section 17 of title 20. . . .

United States Department of Labor regulations explain the purpose of the Fitzgerald Act and accompanying regulations as follows:

> The purpose of this part is to set forth labor standards to safeguard the welfare of apprentices and to extend the application of such standards by prescribing policies and procedures concerning the registration for certain federal purposes of acceptable apprenticeship programs with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training. These labor standards, policies and procedures cover the registration, cancellation and de-registration of apprenticeship programs and of apprenticeship agreements; the recognition of a State agency

> as the appropriate agency for registering local apprenticeship programs for certain federal purposes; and matters relating thereto.

29 C.F.R. § 29.1(b). [emphasis added].

Subsequent regulations enacted pursuant to the Fitzgerald Act set forth the procedures for seeking registration of apprentice programs and the standards for such registration. 29 C.F.R. §§ 29.3-29.5. The standards for apprenticeship programs address the length of the apprenticeship, the schedule of wages to be paid, the nature of the review and evaluation of job performance, the ratio of apprentices to journeymen, and the adequacy and safety of equipment. 29 C.F.R. § 29.5. In addition, states are given the authority to establish committees to register apprenticeship programs. 29 C.F.R. §

29.12. The term "apprentice" is defined to include a broad range of workmen in skilled trades. 29 C.F.R. §§ 29.2(e), 29.4.

In this case, the Oklahoma Labor Commissioner's Declaratory Ruling furthers the policies and directives established by the Fitzgerald Act and accompanying regulations. The Declaratory Ruling encourages the extension of apprenticeship standards by establishing the federal standards as prerequisites to the payment of less than journeymen's wages on Oklahoma public works projects. To preempt the Commissioner's Declaratory Ruling, as did the Tenth Circuit, is to impair a federal law, a result prohibited by ERISA's savings clause.

In reaching a contrary conclusion, the Tenth Circuit relied primarily on Shaw v. Delta Air Lines, 463 U.S. 85 (1983), this Court's most recent pronouncement on the application of ERISA's savings clause to a federal statutory scheme that authorizes federal and state regulation in furtherance of federal policies. In Shaw, the Court concluded that whether ERISA preempted New York's laws prohibiting discrimination in providing pregnancy benefits depended upon the particular state law's relationship to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e) et seq. The Court found that New York laws that prohibited employment practices also prohibited by Title VII were protected from preemption by ERISA

savings clause. It reasoned that preemption of these state laws would frustrate the goal of joint state and federal enforcement of Title VII and that such disruption of the enforcement scheme contemplated by Title VII would modify and impair federal law. 463 U.S. at 103. However, the Court in Shaw further found that New York laws that prohibited employment practices that Title VII allowed were not protected from preemption by ERISA's savings clause. The Court reasoned that since "Title VII is neutral on the subject of all employment practices it does not prohibit," no federal law would be impaired by preemption of a state law extending beyond the reach of Title VII. 463 U.S. at 103-104. [emphasis added].

Contrary to the holding of the Tenth Circuit in the instant case, Shaw supports the application of ERISA's savings clause to the Labor Commissioner's Declaratory Ruling. Unlike the New York laws found to be preempted by the Shaw court, the Fitzgerald Act and accompanying United States Department of Labor regulations are not neutral regarding the standards for apprenticeship programs that the Oklahoma Labor Commissioner established as prerequisite to the payment of a lower trainee wage rate to elevator mechanics' helpers. The Fitzgerald Act and accompanying regulations encourage the formulation and promotion of labor standards for apprentices, and, by precluding the application of federal apprenticeship standards to an employee

training program, the Tenth Circuit's decision thwarts the policies of the Fitzgerald Act.[1]

In fact, in MacDonald, supra, the Ninth Circuit followed Shaw in finding that ERISA's savings clause protected a state's application of United States Department of Labor apprenticeship standards from preemption. MacDonald involved a Nevada law that allowed an exemption from the state's prevailing wage laws for apprenticeship programs approved by the Nevada Apprenticeship

[1] Throughout this proceeding, NEII has argued that, under Shaw, the fact that the United States Department of Labor has recognized the lower helper wage rate on federal public works projects requires states to do so as well. This argument is misguided, for, regardless of the federal rates, a state retains authority to establish wage rates on its own public works projects. Siuslaw Concrete Construction Co. v. Department of Transportation, 784 F.2d 952 (9th Cir. 1986).

Council but did not allow an exemption for federally approved programs. The Ninth Circuit concluded that Nevada could not allow the exemption for a state-approved apprenticeship program while denying the same exemption to a federally-approved program. It reasoned that, to the extent that state laws establish standards for apprenticeship programs apart from those set forth in the Fitzgerald Act and accompanying regulations, the state standards were preempted by ERISA. 949 F.2d at 274.

Significantly, under the Ninth Circuit's reasoning, regulation of apprenticeship programs through application of standards established by the Fitzgerald Act and accompanying regulations are expressly saved from preemption. The Ninth Circuit wrote,

"there is no exemption from the broad preemption provision of Section 514(a) of ERISA, except for the federal Fitzgerald Act and the regulations issued thereunder." [emphasis added]. 949 F.2d at 274. [emphasis added] The MacDonald Court further explained, "the approval of the JAC Apprenticeship Program by BAT in effect establishes that that program meets the requirements of the Fitzgerald Act, the only apprentice regulations that are permissible as not being preempted by Section 514(a) of ERISA." 949 F.2d at 274. The MacDonald court concluded that Nevada might properly exempt apprentices from Nevada's prevailing wage law if those apprentices were enrolled in a program approved by either the United

States Department of Labor or a state apprenticeship counsel.

Under the MacDonald court's holding, there is no impediment to denying a prevailing wage exemption (and thus requiring payment of wages at the higher journeymen rates) to apprentices in a program approved by neither a state apprenticeship counsel nor the United States Department of Labor. In fact, one federal district court has applied MacDonald to prohibit an employer from paying less than journeymen's wages to trainees on state prevailing wage projects who are enrolled in an unapproved training program. Dillingham Construction N.A. Inc. v. County of Sonoma, 778 F. Supp. 1522 (N.D. Cal. 1991).

The Ninth Circuit's application of ERISA's savings clause in MacDonald is thus in direct conflict with the Tenth Circuit's application of the same provision in the instant case. Under the Ninth Circuit's decision, a state may require federal approval of an apprenticeship program as a prerequisite to the payment of less than journeymen wage rates to trainees and apprentices on public works projects. Under the Tenth Circuit's decision, ERISA preempts a state's application of federal apprenticeship standards in determining apprentice wages.

Therefore, this case presents this Court with an opportunity to clarify its holding in Shaw regarding the scope of ERISA's savings clause. Since states are engaged in substantial regulation of

labor conditions on public works projects, guidance from this Court is needed as to the extent to which federal standards may be applied.

II.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER ERISA PREEMPTS STATES' REGULATION OF APPRENTICE WAGE RATES ON PUBLIC WORKS PROJECTS.

In its decision in this case, the Tenth Circuit extended ERISA's preemptive sweep into an area traditionally regulated by the states: wage rates on public works projects. The express terms of ERISA, regulations enacted pursuant to it, case law interpreting it, and the very purpose of its preemption provision do not support this extension of ERISA preemption. This Court should grant certiorari to consider the limits of ERISA preemption

when wage rates on public works projects are concerned.

Petitioners acknowledge that, in light of its broad preemption provision, 29 U.S.C. § 1144(a), ERISA has been held to preempt not only state laws involving matters addressed by ERISA (e.g., reporting, disclosure, and fiduciary responsibility standards), but also laws that "relate" to employee benefit plans. Shaw v. Delta Air Lines, 463 U.S. at 98. As a general rule, state laws have been held to "relate to" employee benefits plans if they have a "connection or reference to such plans," Shaw, 463 U.S. at 97. Under this standard, the following kinds of state laws have been held to "relate to" employee welfare benefit plans such as they are preempted by ERISA: (1) state laws that prescribe

the type and amount of contributions to a plan; (2) state laws that establish rules and regulations under which a plan must operate; and (3) state laws that establish the nature and amount of benefits provided under a plan. See General Electric Co. v. New York State Department of Labor, 891 F.2d 25 (2nd Cir. 1989) cert. denied 110 S.Ct. 2603 (1990).

Nevertheless, "some state actions may affect employee benefit plans in too tenuous, remote, or peripheral manner to warrant a finding that the law 'relates to' the plan." Shaw v. Delta Air Lines, 463 U.S. at 100 n. 21. Specifically, as to state laws concerning matters traditionally regulated by states, there is a presumption that Congress did not intend ERISA to be preemptive.

Massachusetts v. Morash, 490 U.S. 107, 118 (1989); Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 740 (1985).

The matter addressed by the Labor Commissioner in the instant case, wage levels on public works projects, has been traditionally regulated by the states. Morash, 490 U.S. 118; Siuslaw Concrete Construction Co. v. Department of Transportation, 784 F.2d 952, 958 (9th Cir. 1986). In addition, the Secretary of Labor has promulgated a regulation excepting from the definition of an "employee welfare benefit plan" regular wages paid to employees. 29 C.F.R. § 2510.3(b)(1). Moreover, a number of courts have held that claims to recover wages earned during the course of employment are not preempted

by ERISA. See e.g., Krause v. Dresser Industries, Inc., 910 F.2d 674, 680 (10th Cir. 1990); California Hospital Ass'n v. Henning, 770 F.2d 856, 859 (9th Cir. 1985), cert. denied, 477 U.S. 904, reh'g denied 478 U.S. 1031 (1986); Scott v. Gulf Oil Corp., 754 F.2d 1499, 1505 (9th Cir. 1985).

To be sure, in its decision in the instant case, the Tenth Circuit relied on several cases holding certain aspects of state prevailing wage laws to be preempted by ERISA. However, the majority of these cases do not involve a state's attempt to directly regulate regular wage payments. See e.g., Local Union 598, Plumbers and Pipefitters Journeymen and Apprentices Training Fund v. J.A. Jones Construction Co., 846 F.2d 1213 (9th Cir.) aff'd 488 U.S. 881 1988)

(Washington law mandating contributions to apprenticeship plan held preempted); Hydrostorage Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee, 891 F.2d 719 (9th Cir. 1989), cert. denied 101 S.Ct. 72 (1990) (state law requiring participation in an apprenticeship program and requiring contributions to that plan held preempted); General Electric Co. v. New York State Department of Labor, 891 F.2d 25 (2nd Cir. 1989) cert. denied 496 U.S. 912 (1990) (state law requiring payment of prevailing benefits or their cash equivalent held preempted). In fact, in subsequent proceedings in General Electric, the Second Circuit held that the provisions of New York law that concerned wage payments could be severed from the non-wage benefit provisions

such that the wage provisions, unlike the benefit provisions, were not preempted by ERISA. 936 F.2d 1448, 1460-61 (2d Cir. 1991).

In addition, one of this Court's recent pronouncements in this area, Massachusetts v. Morash, supra, indicates that matters such as wage regulation on state public works projects fall outside the scope of ERISA preemption. In Morash, the Court held that an employer's policy of paying an employee for unused vacation time was not an "employee welfare benefit plan" such that an action to enforce that policy was not preempted by ERISA. In reaching this conclusion, this Court noted that, "in enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to

finance employee benefits and the failure to pay employees benefits from accumulated funds." 490 U.S. at 1115. The Court further noted that:

> Because ordinary vacation payments are typically fixed due at known times and do not depend on contingencies outside the employee's control, they present none of the risks that ERISA is intended to address. If there is a danger of defeated expectations, it is no different from the danger of defeated expectations of wages for services performed--a danger Congress chose not to regulate in ERISA.

109 S.Ct. at 1673. [emphasis added].

This Court's preemption analysis in Morash does not support the Tenth Circuit's decision here. In particular, the regulation of wage rates for trainees on public works projects presents neither the risk of mismanagement of funds nor the risk of

a loss of non-wage benefits to employees. In requiring the payment of the higher journeymen wage rate until such time as NEII's training program is approved by the United States Department of Labor's Bureau of Apprenticeship Training, the Labor Commissioner did what he is authorized to do: regulate wages and encourage the extension of federally established standards to training programs. Therefore, this case presents this Court with an opportunity to clarify the limits of ERISA's preemption provision with regard to the states' authority over labor conditions on state public works projects. As one district court has written:

> The power to establish and enforce minimum employment standards falls squarely within the State's legitimate

> exercise of its police power. If the State were not able to require that apprenticeship programs be approved before employers may pay workers less than prevailing wages, then the apprenticeship system would become a wide-open loophole through which employers could hire and underpay workers on state public works contracts without offering them the legitimate benefits of apprenticeship status. It is inconceivable that either ERISA or the NLRA could be logically intended or construed to dictate this result.

Dillingham Construction N.A., Inc. v. County of Sonoma, 778 F. Supp. 1522, 1534 (N.D. Cal. 1991).

CONCLUSION

For the reasons stated above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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92-150

No. ,

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

DEAN H. CALHOON, as Commissioner of the Department of Labor for the State of Oklahoma; and THE DEPARTMENT OF LABOR FOR THE STATE OF OKLAHOMA,

Petitioners,

v.

NATIONAL ELEVATOR INDUSTRY, INC.,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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EXHIBIT "A"

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

NATIONAL ELEVATOR INDUSTRY INC.,	)
Plaintiff-Appellant,	)
v.	) No. 90-6236
DEAN H. CALHOON, as Commissioner of the Department of Labor for the State of Oklahoma; THE DEPARTMENT OF LABOR FOR THE STATE OF OKLAHOMA,	)
Defendant-Appellee.	)

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. CIV-90-119-W)

Charles O. Strahley of Crowe & Dunlevy, Oklahoma City, Oklahoma
(Michael T. McGrath of Putney, Twombly, Hall & Hirson, New York, New York, with him on the briefs) for plaintiff-appellant.

Rabindranath Ramana, Assistant Attorney General of Oklahoma
(Robert H. Henry, Attorney General of Oklahoma, with him on the brief) Oklahoma City, Oklahoma, for defendants-appellees.

Before LOGAN, MOORE and ANDERSON, Circuit Judges.

LOGAN, Circuit Judge.

Plaintiff National Elevator Industry, Inc. appeals from the dismissal of its complaint which sought to have a ruling of the Oklahoma Commissioner of Labor declared preempted by either the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, et. seq., or the National Labor Relations Act (NLRA), 29 U.S.C. § 151, et. seq., or both. Plaintiff seeks to overturn a ruling by defendant Oklahoma Commissioner of the Department of Labor under Oklahoma's prevailing wage law that an elevator constructor helper on state public works

projects must be enrolled in a certified Bureau of Apprenticeship Training program in order to receive the rate of pay for apprentices and trainees rather than the rate of pay for mechanics. See Declaratory Ruling of the Labor Commissioner, Rule 1-89 (Dec. 22, 1989), II R. ex. B; Okla. Stat. tit. 40, §§ 196.1, 196.2.9, 196.6.A. The district court dismissed the complaint on the motion of defendants, Department of Labor for the State of Oklahoma and its Commissioner. This court has jurisdiction over plaintiff's appeal pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1291.

I

For many decades, the wages, hours and working conditions of mechanics and helpers employed in the elevator industry have been established by a series of nationwide collective bargaining agreements. These agreements provide for "teams"; each team

consists of one mechanic and one helper. Helpers are workers who have not completed training under the National Elevator Industry Education Program (NEIEP) and passed a mechanics examination. Any helper may participate in this national training program in order to qualify as a mechanic, and many do. NEIEP is funded by employers based upon hours worked by all mechanics and helpers.

The wages for mechanics and helpers are calculated under the collectively bargained contract using a specific formula that utilizes variables from local geographical areas to determine the appropriate prevailing wage for a particular area. Helpers' wages are set at seventy percent of mechanics' wages. Despite plaintiff's collectively bargained agreement determining wages for helpers, defendants refuse to recognize the helper category for purposes

of the Oklahoma prevailing wage law. Therefore, helpers working on State of Oklahoma public works projects must be paid at the mechanics' collectively bargained wage. Helpers on federal or private projects in Oklahoma continue to be paid at the helper's wage rate. Defendants, in the ruling under challenge here, would allow helpers to receive the lower wage rate for apprentices and trainees if the helpers' education program were approved by the federal Bureau of Apprenticeship Training (BAT). Plaintiff does not challenge the validity of the Oklahoma prevailing wage law itself but does contest defendants' construction of that law.

II

Whether defendants' ruling is preempted by ERISA is a question of law subject to de novo review. Local Union 598, Plumbers & Pipefitters Indus. Journeymen & Apprentices

Training Fund v. J.A. Jones Constr. Co., 846 F.2d 1213, 1218 (9th Cir.), aff'd mem., 488 U.S. 881 (1988); see Allis-Chalmers Credit Corp. v. Tri-State Equip., Inc. (In re Tri-State Equip., Inc.), 792 F.2d 967, 970 (10th Cir. 1986) (questions of law are subject to de novo review).

ERISA contains a sweeping preemption provision that preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). In our analysis we are guided by Congress' clear intent and the Supreme Court's direction that ERISA preemption be construed broadly. See, e.g., Ingersoll-Rand Co. v. McClendon, 111 S.Ct. 478, 482 (1990) (Congress intended expansive ERISA preemption); FMC Cor. v. Holliday, 111 S.Ct. 403, 407 (1990) (ERISA "pre-emption clause is conspicuous for its breadth."); see also Straub v. Western Union Tel. Co.,

851 F.2d 1262, 1263 (10th Cir. 1988) (scope of ERISA preemption is very broad).

Section 1144(a) contains three requirements which must be satisfied before preemption will be found. There must be a state law, an employee benefit plan, and the state law must "relate to" the employee benefit plan.[1] If these three requirements

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[1] The Second and Ninth Circuits have found an additional, although not well-defined, "purpose" requirement arising out of § 1144(c)(2) which defines "State." See, e.g., Electrical Joint Apprenticeship Comm. v. MacDonald, 949 F.2d 270, 274 (9th Cir. 1991); Martori Bros. Distribs. v. James-Massengale, 781 F.2d 1349, 1356 (9th Cir.), modified, 791 F.2d 799 (9th Cir.), cert. denied, 479 U.S. 1018 (1986); Rebaldo v. Cuomo, 749 F.2d 133, 137 (2d Cir. 1984), cert. denied, 472 U.S. 1008 (1985). This requirement is that the "state law must 'purport[] to regulate, . . . the terms and conditions of employee benefit plans' to fall within the preemption provision." Rebaldo, 749 F.2d at 137. The existence of a distinct and limiting "purpose" requirement, however, has been rejected by the Supreme Court which held that § 1144(c)(2) "expands, rather than restricts" the reach of ERISA preemption. Ingersoll-Rand, 111 S.Ct. at 484. "Had Congress intended to restrict ERISA's pre-emptive effect to state laws purporting to regulate

are satisfied, then a court must consider whether any of the preemption exceptions under §§ 1003(b) or 1144(b), (d) apply.

First, we note that defendants' interpretive ruling is clearly "State law" for purposes of § 1144(a). Section 1144(c)(1) defines "State law" to include "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1); see also id. at (2) (defining term "State" to include any state agency).

Next, the district court found, and defendants on appeal agree, that NEIEP is an employee benefit plan under ERISA. We also agree that the helpers' training program, the NEIEP, is an employee benefit plan under

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plan terms and conditions, it surely would not have done so by placing the restriction in an adjunct definition section while using the broad phrase 'relate to' in the pre-emption section itself." Id.

ERISA. Section 1002(1) defines "employee welfare benefit plan" to mean:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services. . . .

28 U.S.C. § 1002(1) (emphasis added); see also id. at (3) ("employee welfare benefit plan" is an "employee benefit plan"). NEIEP is a national training program administered by a board of trustees; it receives regular contributions from employers and exists for the exclusive benefit of employees. The clear language of the statute indicates that

training programs, as distinct from apprenticeship programs, qualify as employee welfare benefit plans. The more difficult issue in this case is whether the state law "relates to" the employee benefit plan. The Supreme Court noted in Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983), that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." Id. at 96-97. Moreover, "relate to" should be read broadly. Id. at 98; see also Straub, 851 F.2d at 1264. Even broad construction, however, has limits; the Court in Shaw stated that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." Shaw, 463 U.S. at 100 n. 21. In recognition of this limitation articulated in Shaw, a

number of courts have found state laws of general application with some limited effect on ERISA plans do not "relate to" the ERISA plans under § 1144(a). See, e.g., Aetna Life Ins. Co. v. Borges, 869 F.2d 142, 146-47 (2d Cir.) (upholding general escheat law that affected ERISA benefit plans), cert. denied, 493 U.S. 811 (1989); Firestone Tire & Rubber Co. v. Neusser, 810 F.2d 550, 556 (6th Cir. 1987) (upholding general income tax that included employee contributions to ERISA plan); Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc., 793 F.2d 1456, 1470 (5th Cir. 1986) (finding no preemption of state law breach of fiduciary duty claims), cert. denied, 479 U.S. 1034 (1987); Rebaldo v. Cuomo, 749 F.2d 133, 140 (2d Cir. 1984) (upholding statute regulating hospital rates that affected ERISA plans' ability to

negotiate special rates), cert. denied, 472 U.S. 1008 (1985).

There is no simple test for determining when a law "relates to" a plan. Borges, 869 F.2d at 145. The Ninth Circuit in Martiori Bros. Distributors v. James-Massengale, 781 F.2d 1349 (9th Cir.), cert. denied, 479 U.S. 1018 (1986), recognized four types of laws that have been held to "relate to" ERISA plans. They are:

> First, laws that regulate the type of benefits or terms of ERISA plans. Second, laws that create reporting, disclosure, funding, or vesting requirements for ERISA plans. Third, laws that provide rules for the calculation of the amount of benefits to be paid under ERISA plans. Fourth, laws and common-law rules that provide remedies for misconduct growing out of the administration of the ERISA plan.

Id., at 1356-57 (footnotes omitted); see also General Elec. Co. v. New York State Dep't of Labor, 891 F.2d 25, 29 (2d Cir. 1989), cert. denied, 110 S.Ct. 2603 (1990).

On the other hand, laws of general application--not specifically targeting ERISA plans--that involve traditional areas of state regulation and do not affect "relations among the principal ERISA entities--the employer, the plan, the plan fiduciaries, and the beneficiaries"--often are found not to "relate to" an ERISA plan. Firestone, 810 F.2d at 555-56 (quoting Summers, 793 F.2d at 1467).

Defendants, in essence, argue that the prevailing wage law and the Commissioner's ruling are laws of general application, involving wage regulation--an area of traditional state regulation--that do not "relate to" the NEIEP. General application wage laws, although they incidentally may affect ERISA plans, are well within a state's traditional police powers and not prompted by ERISA. See Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756

(1985) (noting in NLRA context that states have broad authority to regulate wages and worker safety); Siuslaw Concrete Constr. Co. v. Washington, Dep't of Transp., 784 F.2d 972, 958 (9th Cir. 1986) (upholding state minimum wage law); General Elec., 891 F.2d at 30 (Pratt, J., dissenting) (noting "[r]egulation of labor costs in public works projects is surely a valid exercise of the state's traditional regulatory authority"). Plaintiff conceded at oral argument that a state has the authority to impose a minimum wage on workers without ERISA preemption.

Our task is to determine whether the Oklahoma prevailing wage law as interpreted by defendants' ruling is indeed a law of general application with only incidental effect on NEIEP. Both parties cite a host of ERISA preemption cases in support of their respective positions. A number of these cases merit brief discussion. In

Hydrostorage, Inc. v. Northern Cal. Boilermakers Local Joint Apprenticeship Committee, 891 F.2d 719 (9th Cir. 1989), cert. denied, 111 S.Ct. 72 (1990), under authority of a California law, a state agency order banned a contractor from bidding for public works contracts because, inter alia, the contractor had not applied for approval to train apprentices. Id. at 723. The agency sought to require the contractor to participate in an ERISA plan and make contributions to an ERISA plan. Id. at 730. The Ninth Circuit found ERISA preemption of the order. Id. at 732; see also Operating Engineers & Participating Employers Pre-Apprentice, Apprentice & Journeyman Affirmative Action Training Fund v. Weiss Bros. Const., 270 Cal. Rptr. 786, 794 (Cal. Ct. App. 1990) (finding ERISA preemption of a contract claim in connection with the same California law at issue in

Hydrostorage), cert. denied, 111 S.Ct. 1337 (1991).

The instant case has strong similarities to Hydrostorage. Defendants' interpretation of the prevailing wage law has the effect, and possibly the aim, of encouraging participation in a specific type of ERISA plan (BAT approved apprentice plans) while discouraging participating in a different type of ERISA plan (NEIEP). In Hydrostorage, however, the state mandated participation in and contribution to an ERISA benefit plan, while here defendants' actions encourage but do not mandate changes and participation in an ERISA plan.

In a second Ninth Circuit case, Electrical Joint Apprenticeship Comm. v. MacDonald, 949 F.2d 270 (9th Cir. 1991), the court considered application of Nevada statutes that allowed apprentice/training wages to be paid only to workers in state

approved apprenticeship programs. The plaintiff had a BAT approved ERISA apprenticeship program but was required to pay the regular prevailing wage to apprentices because their plan was not approved by the state. The Ninth Circuit found this application of the Nevada prevailing wage statutes to be preempted by ERISA. Id. at 275. MacDonald resembles the instant case because both cases involve states requiring higher wages for workers in ERISA training programs they do not approve of while allowing lower wages for workers in ERISA training programs of which they do approve.

The Second Circuit, in General Electric C. v. New York State Department of Labor, 891 F.2d 25 (2d Cir. 1989), cert. denied, 110 S.Ct. 2603 (1990), considered a state prevailing wage law that required employers bidding for state public works projects

either to provide prevailing benefits or to pay the difference in cash to their employees. The court held that the law "related to" employee benefit plans. Id. at 29-30. Judge Pratt dissented arguing that the law "does not interfere with any of the primary administrative functions of ERISA plans; it does not affect the structure or administration of benefits plans; it does not determine an employee's eligibility for benefits; nor does it control the type or level of benefits provided," and therefore, preemption was not appropriate. Id. at 30 (Pratt, J., dissenting).

The facts and issues in General Electric are also somewhat like those in the present case. In General Electric employers were given a choice similar to that presented to plaintiff: either change the benefits of their ERISA plan to meet the state's specifications or pay workers more money.

There are, however, important differences between General Electric and the instant case. In General Electric, under the option to pay more money, the amount due varied depending upon the level of ERISA benefits and therefore was inextricably linked to the ERISA plan. In the case before us, the prevailing wage level does not vary and is not tied to the value of the benefits provided under NEIEP.

The Eighth Circuit, in Boise Cascade Corp. v. Peterson, 939 F.2d 632 (8th Cir. 1991), petition for cert. filed, No. 91-707 (U.S. Oct. 28, 1991), held that a state minimum jobsite ratio rule of apprentices to journeymen was preempted by ERISA even though worker safety is an area of traditional state regulation. Id. at 638. The court held that such a law directly affected and intended to regulate terms and conditions of an ERISA plan and therefore

"related to" the plan. Id. Boise Cascade stands for the proposition that even rules of general application in an area of traditional state regulation are preempted if their effects upon an ERISA plan are direct and not tenuous.

A recent district court case also merits discussion. In Associated Builders & Contractors, Golden Gate Chapter, Inc. v. Baca, 769 F. Supp. 1537 (N.D. Cal. 1991), the court considered a prevailing wage law that imposed payment of per diem wages upon employers for certain public and private works projects. The amount of the per diem wages was dependent in part upon the monetary value of prevailing benefits. Id. at 1546. The court found ERISA preemption because the law imposed upon employers the administrative burden of calculating the value of benefits provided; anticipated either cash supplements or increased

benefits; and discouraged ERISA benefits in amounts above the prevailing amounts because of a limit on the amount of benefits that could be subtracted in the per diem wage calculation. Id. at 1547.

All the above cases dealt with apprenticeship/training programs or wages or both, and all found preemption. Although the facts of the case before us differ in some specifics from these other cases, the principles articulated do support preemption in the present case. Although wage regulation is an area of traditional state regulation, when wage regulations uniquely affect ERISA plans and involve the state in imposing requirements upon such plans, preemption will be found.

To support their argument that wage regulation is not within ERISA preemption due to a wage exception defendants rely upon 29 C.F.R. § 2510.3-1(b), which states that

the payment of wages does not give rise to an employee welfare benefit plan.[2] The reliance on this wage exception is misplaced. Section 2510.3-1(b) only applies in determining whether an employee welfare benefit plan exists. If payment of wages created an employee welfare benefit plan, all paid employees would be in an ERISA

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[2]Section 2510.3-1(b) states:

> Payroll practices. For purposes of title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include--
>
> (1) Payment by an employer of compensation on account of work performed by an employee, including compensation at a rate in excess of the normal rate of compensation on account of performance of duties under other than ordinary circumstances, such as--
>
> (i) Overtime pay,
> (ii) Shift premiums,
> (iii) Holiday premiums,
> (iv) Weekend premiums; . . . .

29 C.F.R. § 2510.3-1(b).

plan, and ERISA would govern all employment or labor law--a result Congress did not intend. Once NEIEP is determined to be an employee benefit plan, 29 C.F.R. § 2510.3-1(b) has no further application. Because NEIEP is undisputedly an ERISA employee benefit plan, the wage exception is irrelevant to our preemption analysis. Massachusetts v. Morash, 490 U.S. 107 (1989), and Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1 (1987), do not hold otherwise. These cases merely refuse to find that payment of various wages from general funds given rise to an employee benefit plan. See Morash, 490 U.S. at 120-21 (vacation pay policy is not an employee benefit plan); Fort Halifax, 482 U.S. at 12 (statute requiring severance pay does not create or relate to an employee benefit plan).

We accept, as a general proposition, the state's right to regulate wages. But a wage law that provides an option favoring certain ERISA plans and benefits (BAT approved plans) over other ERISA plans and benefits (NEIEP) is not a law of "general application" and may be used to effect change in the administration, structure and benefits of an ERISA plan. If a state is permitted to use a prevailing wage scheme to single out and for certain ERISA plans over other ERISA plans, the potential for abuse is great--a state could avoid ERISA's preemption provision and covertly disturb or alter ERISA plans. We believe that defendants' ruling would discourage non-BAT approved ERISA training programs and encourage changes to NEIEP, a national employee benefit program. We hold that defendants' ruling applying the state's prevailing wage law does "relate to" an

employee benefit plan because the ruling's effects on NEIEP are not "tenuous, remote, or peripheral." See Shaw, 463 U.S. at 100 n. 21.

III

Finally, we consider whether the general savings clause in 29 U.S.C. § 1144(d) saves defendants' ruling from preemption. The savings clause states: "Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." 29 U.S.C. § 1144(d). Defendants argue that preempting their ruling would "impair" and "supersede" 29 U.S.C. § 50 and regulations created pursuant to it. See 29 C.F.R. §§ 29.1-.13, 30.1-.19.

The savings clause generally saves federal law. See 29 U.S.C. § 1144(d) ("any law of the United States") (emphasis added).

The savings clause may also apply to some state laws in limited circumstances, but the Supreme Court has directed that it should not be applied expansively. Shaw, 463 U.S. at 104. In Shaw, the Court recognized that while the savings clause "may operate to exempt provisions of state laws upon which federal laws depend for their enforcement, the combination of Congress' enactment of an all-inclusive pre-emption provision and its enumeration of narrow, specific exceptions to that provision makes us reluctant to expand [§ 1144(d)] into a more general saving clause." Id. In Shaw, the Court held that state laws that prohibited conduct unlawful under Title VII of the Civil Rights Act of 1964 were saved from preemption because Title VII relies upon state laws as part of its enforcement scheme. Id. at 102. The Court noted that Title VII has a provision expressly preserving

nonconflicting state laws. Id. at 101. State laws prohibiting practices lawful under Title VII, however, are not saved by the savings clause. Id. at 103.

Section 50 does not depend upon states to enforce its provisions; in fact, there is nothing in § 50 for states to enforce.[3] Section 50 merely seeks to facilitate

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[3] Section 50 provides:

> The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Office of Education under the Department of Health, Education, and Welfare in accordance with section 17 of Title 20.

development of apprenticeship programs--it does not mandate apprenticeship programs or seek to discourage other training programs.[4] We agree with the Ninth Circuit that "the regulations relate only to eligibility for federal registration. Neither they nor the Act [§ 50] itself contemplate enforcement mechanisms. . . . ." Hydrostorage, 891 F.2d at 731 (citing and adopting the district court's analysis, 685 F. Supp. 718, 722 (N.D. Cal. 1988)); see also MacDonald, 949 F.2d at 274 n. 3 (ERISA "does not permit independent state regulation" under §50). Therefore, defendants' ruling simply cannot be said to function as an enforcement mechanism for § 50. We decline to make §

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[4]The federal government does not discourage the NEIEP with a prohibitive wage structure as defendants seek to do. The U.S. Department of Labor recognizes the helper category and allows the lower wage rate for helpers on federal public works projects in Oklahoma. See United States Dep't of Labor, General Wage Decision No. OK88-18.

1144(d) into an expansive savings clause; we hold that the savings clause of § 1144(d) does not save the defendants' ruling from ERISA preemption. See Hydrostorage, 891 F.2d at 731-32 (state law encouraging apprenticeship programs not saved from ERISA preemption by § 1144(d)); MacDonald, 949 F.2d at 275 (wage law favoring state apprenticeship programs not saved from ERISA preemption).

IV

We conclude that ERISA preempts defendants' ruling that helpers working on state public works projects must be paid at the wage rate required for mechanics unless the helpers are participating in a BAT approved apprenticeship program. A state may not try to discourage certain ERISA training programs by imposing a higher wage rate for workers enrolled in them while allowing a lower wage rate for workers

enrolled in different ERISA training programs. Because we find ERISA preemption, we do not address the NLRA preemption issue. The judgment of the district court is REVERSED.

EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

NATIONAL ELEVATOR INDUSTRY, INC.,	)	
Plaintiff,	)	
vs.	)	**No. CIV-90-119-W**
DEAN H. CALHOON, as Commissioner of the Department of Labor for the State of Oklahoma; and THE DEPARTMENT OF LABOR FOR THE STATE OF OKLAHOMA,	)	
Defendants.	)	

ORDER

This matter comes before the Court on Motion of Defendants, Dean H. Calhoon and the Department of Labor for the State of Oklahoma to Dismiss Plaintiff's claims. In this case, Defendants determined by ruling that elevator constructor helpers working on state public works projects are to receive the same minimum wages as elevator

construction mechanics. Plaintiff asserts that Defendants' ruling is preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. (ERISA), and the National Labor Relations Act, 29 U.S.C. § 151, et seq. (NLRA). Plaintiff also makes claims that Defendants' ruling is clearly erroneous and that Defendants unlawfully solicited communication from persons outside the Oklahoma Department of Labor in violation of Oklahoma law. For the reasons stated below, the Court grants Defendants' Motion to Dismiss.

The Plaintiff, National Elevator INdustry, Inc., (NEII) is a trade association that represents employers engaged in constructing, repairing and servicing elevators, escalators, dumb waiters, and moving walkways. Plaintiff sought a ruling from Defendants which would deem elevator constructor helpers as

apprentices or trainees for purposes of establishing the helpers' prevailing wages.

Defendants, Commissioner of Labor and the Department of Labor for the State of Oklahoma, ruled that Oklahoma did not provide a separate and distinct category for "helpers" for purposes of setting prevailing wages. Under Oklahoma law, Title 40 O.S. § 196.1 provides that the prevailing rate of wages applies to "workmen," while Section 196.2.8 defines "workmen" as "laborers, workmen and mechanics." Section 196.2.9 provides:

> "'Apprentice' or 'Trainee' means a workman in a craft or trade who is approved for participation in an apprenticeship or trainee program approved by the Bureau of Apprenticeship and Training of the United States Department of Labor[.]"

Nowhere under Oklahoma law is "helper" established as a separate category of work.

In fact, Rule 8 of the Commissioner of Labor's Rules states:

> "'Helper' as a classification of worker shall not be recognized by the Oklahoma Department of Labor." Prevailing Wages on Public Works, Law and Rules, Oklahoma Department of Labor, August, 1989.

Accordingly, Defendants did not deem the elevator constructor helpers as apprentices or trainees because the educational program provided for the elevator constructor helpers had not been approved by the Bureau of Apprenticeship and Training of the United States Department of Labor. Because the educational program does not incorporate the safeguards afforded federally approved apprenticeship programs, the Defendants' ruled that elevator constructor helpers would receive the higher minimum wage of the elevator constructor mechanic.

PREEMPTION ISSUE UNDER ERISA

Plaintiff asserts that because its educational program for elevator constructor helpers is an employee welfare benefit plan as defined under ERISA, the Defendants' ruling is preempted by ERISA.

Plaintiff's educational program, National Elevator Industry Educational Program, was initially established as a trust pursuant to a collective bargaining agreement. This training program provides text materials and training aids to elevator constructor helpers and has made cash grants for classroom rent and instructors' salaries in Oklahoma. Plaintiff's educational program has not been approved by the Bureau of Apprenticeship and Training of the United States Department of Labor.

Plaintiff asserts that its educational program is an employee benefit plan within the meaning of ERISA. This Court agrees.

ERISA defines employee welfare benefit plan as follows:

> "(1) The terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions." 29 U.S.C. § 1002 (emphasis added.)

Clearly, by Plaintiff's verified complaint, it appears that its educational program is maintained for apprenticeship or other training within the meaning of ERISA.

Next, Plaintiff invokes ERISA's general preemption provision which states in pertinent part:

> "Except s provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this subchapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . " 29 U.S.C. § 1144(a).

ERISA provides, however, a savings clause which states in pertinent part:

> "Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States. . . or any rule or regulation issued under any such law." 29 U.S.C. § 1144(d).

The Court finds that Defendants' ruling which relies on the regulations regarding federal apprenticeship approval falls within ERISA's savings clause.

The Supreme Court of the United States has provided an analysis by which federal and state cooperation may invoke ERISA's

savings clause. In Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983), the Supreme Court held that New York's Human Rights Law was exempt from ERISA's preemption because it played a part in the enforcement scheme of the federal law as contemplated by Title VII. Thus, a disruption of the enforcement scheme would modify or impair federal law to an extent which triggers ERISA's savings clause.

Although that case focused on modification or impairing enforcement of a federal scheme, this Court finds in the instant case preemption would work to supersede or supplant a federal scheme. An employee benefit plan should not preempt state law which coordinates with federal law if preemption would supersede or supplant the federal scheme.

Federal apprentice labor laws contemplate cooperation with State agencies in promoting

labor standards. Title 29 U.S.C. § 50 provides:

> "The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Office of Education under the Department of Health, Education, and Welfare in accordance with section 17 of Title 20. For the purposes of this chapter the term 'State' shall include the District of Columbia." (Emphasis added).

The Court observes that under federal regulations, cooperation with State agencies is further promoted. 29 C.F.R. § 29.1. The same federal regulations also incorporate principles of equal opportunity and affirmative action procedures in order to

obtain federal approval safeguarding the welfare of apprentices. 29 C.F.R. § 30. Accordingly, the federal scheme for the welfare of apprentices includes the protection of apprentices through State agency cooperation.

In the present matter, the Defendants' ruling indicates particular concern regarding the time period in which an apprenticeship or trainee becomes proficient enough to do the work of a mechanic. The Defendants' ruling stats in part:

> "Of particular interest is that an elevator constructor helper may have anywhere from one (1) day's experience, to twenty (20) or more years of experience. He may even become a 'temporary mechanic' after one year if certain educational requirements are satisfied. There is no finite time period when his/her training is needed. In fact, it appears that one could be a career helper/trainee in the elevator constructor industry and never achieve the position of mechanic. There seems to be no time that one can conclude that a helper becomes proficient

> enough to do the work of a mechanic."

This concern evinced in Defendants' ruling reflects the same concern which is safeguarded under Federal Regulations. See 29 C.F.R. § 29.6(d) which requires a statement of the duration of a apprenticeship. Accordingly, Defendants' ruling appears to hold that the elevator constructor helper will receive the higher minimum wage until and unless said workers are afforded the safeguards of finite training periods as mandated by federal regulations.

But more to the point, under the Defendants' ruling, the program will receive automatic acceptance if it is approved by the Bureau of Apprenticeship and Training of the United States Department of Labor as required by Oklahoma law under 49 O.S. § 196.2.9. The Defendants state:

> "That should the elevator constructor helper educational program be accepted by the Bureau of Apprenticeship Training, then we will accept elevator constructor helpers as a trainee/apprentice under that program regardless of how the industry chooses to refer to them." (emphasis added.)

Clearly, Defendants' ruling is not grounded on review of substantive state law. To the contrary, Defendants' ruling dovetails with federal statutes and regulation to the extent of unconditional acceptance upon approval under the federal scheme.

Accordingly, preemption under these facts would supersede and supplant federal regulations regarding apprenticeship training programs as incorporated by Oklahoma law.

NATIONAL LABOR RELATIONS ACT

The National Labor Relations Act (NLRA) contains no statutory preemption provision, but courts have construed a preemptive

effect when preemption would be consistent with the purposes of NLRA. In Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985), the United States Supreme Court stated that the NLRA would supplant state law when such law prevented the accomplishment of the purposes of NLRA. Id. at 756. The Court further found that the establishment of minimum labor standards by a state was a legitimate exercise of the state's police powers and did not interfere with the collective bargaining process which the NLRA seeks to protect. The Court stated:

> "Minimum state law standards affect union and non-union employees equally, and neither encourage nor discourage the collective bargaining processes that are the subject of the NLRA. Nor do they have any but the most indirect effect on the right of self-organization established in the Act. Unlike the NLRA, mandated-benefit laws are not laws designed to encourage or discourage employees in the promotion of

> their interests collectively; rather, they are in part 'designed to give specific minimum protections to individual workers and to ensure that each employee covered by the Act would receive' mandated health insurance coverage. . . . Nor do these laws even inadvertently affect these interests implicated in the NLRA. Rather, they are minimum standards 'independent of the collective-bargaining process [that] devolve on [employees] as individual workers, not as members of a collective organization."

Id. at 755, quoting Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 739, 745 (1981), (emphasis and brackets in original).

In the instant matter, Defendants' ruling is a legitimate exercise under Oklahoma's laws requiring minimum wages on public works. See Title 40 O.S. § 196. Such minimum standards are independent of the collective bargaining process and accordingly are not preempted by the NLRA.

ELEVENTH AMENDMENT

Plaintiff also asserts that Defendants violated Oklahoma state law. In Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984), the United States Supreme Court held the Eleventh Amendment barred injunctive relief against state officials who allegedly violated state laws. Id. at 117. Accordingly, Plaintiff's claims regarding Defendants' violations of state law are barred by the Eleventh Amendment.

CONCLUSION

In summary, Defendants' Motion to Dismiss all Plaintiff's claims is hereby GRANTED.

ENTERED this 31st day of May, 1990.

LEE R. WEST
UNITED STATES
DISTRICT JUDGE

EXHIBIT "C"

OKLAHOMA STATE DEPARTMENT OF LABOR
IN AND FOR THE STATE OF OKLAHOMA

IN RE:	Petition of National Elevator Industry, Inc. For a Declaratory Ruling	)))))	Ruling 1-89

DECLARATORY RULING OF THE LABOR COMMISSIONER

This case comes on for ruling based on the request of the National Elevator Industry, Inc., hereafter referred to as NEII, for a ruling to recognize elevator constructor helpers pursuant to the Minimum Wage on Public Works Law, hereafter referred to as Prevailing Wage Law. Title 40 O.S. section 196.4 allows the Commissioner of Labor to conduct an individual proceeding to determine the applicability of the Prevailing Wage Law. As embodied in General Organizational Rules of the Department of Labor effective February 14, 1983, a determination can be made by the

Commissioner, through a Declaratory Ruling. This ruling will be in conformance with the above and with the Administrative Procedures Act, which allows for an agency head to issue declaratory rulings when requested pursuant to Title 75 O.S. subsection 307. This ruling is appealable to the District Court.

ISSUE

Whether the Commissioner of Labor can recognize the elevator constructor helper in accordance with the Minimum Wages on Public Works Law cited as Title 40 O.S. section 196.1, et seq.

DISCUSSION

On it's face, this would appear to be a rather simple issue to resolve. The Prevailing Wage Law in section 196.6 indicates that "the prevailing hourly rate of wages for this state shall be those filed in the Federal REgister as determined by the

U.S. Department of Labor, pursuant to the Federal Davis-Bacon Act and amendments thereto." The rates for an elevator constructor helper and elevator constructor helper (probationary) are indeed a part of the Davis-Bacon wage rates as published for Oklahoma (attachment 1). The practice of recognition of the elevator constructor helper by the U.S. Department of Labor is indeed one of long standing and was in effect when the 1985 amendments were made to the state Prevailing Wage Law. I further recognize that there is a long standing national practice through the arbitration agreements (Attachment 2 and 3) that show that the national practice indeed borders on historical precedence as recognized by the original drafters of the Federal Davis-Bacon Act (see Building & Construction Trades Department, AFL-CIO v. Donovan, 712 F.2d 611 (1983)). However, even with the above

facts, there remains a significant hurdle statutorily for recognition of helpers in Oklahoma.

One should note, that the development of the Federal Davis-Bacon Act followed a very different track than did the individual state acts. Many states chose not to adopt Davis-Bacon Standards, while others followed very closely. Oklahoma has set similar Davis-Bacon Standards, but have not adopted those standards in a pattern that is totally conducive to all of the rules, regulations, and procedures utilized by the U.S. Department of Labor. Therefore, the acknowledgement of the elevator constructor helper by the U.S. Department of Labor has little or no bearing on Oklahoma's "Little Davis-Bacon" Act.

The U.S. Department of Labor only recognizes helpers if it is determined to be a local practice. According to the U.S.

Department of Labor Field Operations Handbook, "a helper may not be used as an informal apprentice or trainee, and it is not permissible for helpers to use 'tools of the trade' in assisting a journeyman." Oklahoma has taken a similar position in that we do not recognize helpers and have so stated in Rule 8 of our Prevailing Wage Rules. Your detailed description of the educational program provided to helpers in the elevator industry and references to helper education in your Standard Agreement of July 9, 1987 to July 8, 1992, identifies the helper not as a semi-skilled helper, but as a workman who is a trainee. An elevator constructor helper has not been presented as a unique classification of workman, nor as a classification other than trainee/apprentice. The issue therefore becomes one of in what classification is an elevator constructor helper.

Of particular interest is that an elevator constructor helper may have anywhere from one (1) day's experience, to twenty (20) or more years of experience. He may even become a trainee/mechanic" after one year if certain educational requirements are satisfied. There is no finite time period when his/her training is ended. In fact, it appears that one could be a career helper/trainee in the elevator constructor industry and never achieve the position of mechanic. There seems to be no time that one can conclude that a helper becomes proficient enough to do the work of a mechanic.

A rule of statatutory construction is that "where the language of a statute is plain and unambiguous and it's meaning clear and no occasion exists for application of rules of construction, the statute will be accorded the meaning as expressed by the

language therein employed." Cave Springs, Public School District I-30, of Adair County v. Blair, 613 P.2d 1048 (Okla. 1980). The legislature, in defining the classifications of workers in their 1985 amendments, clearly defined workmen as "laborers, workers and mechanics." If an elevator constructor helper was indeed a classifiable, unique category of workman that could be defined, then one could, with a plain reading of the statute conclude that they should be accepted if their craft appears in the federal Davis-Bacon rates. However, such is not the case. there is no definable classification of workman except as a trainee. The legislature further identifies an "apprentice or trainee" as "a craft or trade who is approved for participation in an apprenticeship or trainee program approved by the Bureau of Apprenticeship and Training of the United States Department of

Labor." Since you have clearly identified an elevator constructor helper as a trainee/apprentice, then the plain language of the statute requires these helpers (i.e. trainee/apprentices) to be in an approved program. Once your program is approved, then section 196.10a gives these helpers special employment protection.

Lastly, you suggest that the elevator trade is unique in its operation from other construction trades. I would agree that there is validity to this claim, but it is of your own choosing that you operate in a different manner. The official position of the West Oklahoma Building and Construction Trades Council is that there is no area practice for helper in Oklahoma. (Attachment 4). I note that the elevator constructors union is affiliated with this association.

CONCLUSIONS

1. The elevator constructor helper is, for the purposes of the Oklahoma Minimum Wage on Public Works Law, a trainee/apprentice specifically recognized by the legislature as a class of worker to receive certain protection through enrollment in a certified Bureau of Apprenticeship Training Program.
2. The Commissioner of Labor does not have the authority to recognize a classification in an arbitrary manner contra to a legislative mandate. He only has the authority to identify classifications that are not included in the Federal Davis-Bacon wage rates.
3. That should the elevator constructor helper educational program be accepted by the Bureau of Apprenticeship Training, then we will accept elevator constructor helpers as a trainee/apprentice under

that program regardless of how the industry chooses to refer to them.

It is therefore the final ruling of the Commissioner of Labor that the elevator constructor helper is recognized as a trainee/apprentice and must be in conformance of the requirements of Title 40 Section 196.2(9) in order to be recognized for any for any rate of pay other than that of elevator constructor. This ruling is limited to the facts as developed above and shall not be considered to be applicable to any other classification except the one so indicated. I have included a copy of your brief and those exhibits that are not attachments to this ruling as a part of the official record.

It is so ruled on this 22nd day of December 1989 by the Commissioner of Labor for the State of Oklahoma.

DEAN H. CALHOON
COMMISSIONER

Certified #P155-656-061

EXHIBIT "D"

Section 3(1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C.§ 1002(1):

Definitions

For the purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

Section 514(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a)

Supersedure; effective date

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Section 514(d) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(d)

Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in section 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

29 C.F.R. § 2510(b):

> (b) **Payroll practices.** For purposes of title I of the Act

and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include--

(1) Payment by an employer of compensation on account of work performed by an employee, including compensation at a rate in excess of the normal rate of compensation on account of performance of duties under other than ordinary circumstances, such as--

(i) Overtime pay,
(ii) Shift premiums,
(iii) Holiday premiums,
(iv) Weekend premiums;

29 U.S.C. § 50 (the Fitzgerald Act):

Promotion of labor standards of apprenticeship

The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Office of

> Education under the Department of Health, Education, and Welfare in accordance with section 17 of Title 20. For the purposes of this chapter the term "State" shall include the District of Columbia.

29 C.F.R. § 29.1 (a) and (b):

> (a) The National Apprenticeship Act of 1937, section 1 (29 U.S.C. 50), authorizes and directs the Secretary of Labor "to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Office of Education under the Department of Health, Education, and Welfare ***." Section 2 of the Act authorizes the Secretary of Labor to "publish information relating to existing and proposed labor standards of apprenticeship," and to "appoint, national advisory committees ***." (29 U.S.C. 50a).

(b) The purpose of this part is to set forth labor standards to safeguard the welfare of apprentices, and to extend the application of such standards by prescribing policies and procedures concerning the registration, for certain Federal purposes, or acceptable apprenticeship programs with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training. These labor standards, policies and procedures cover the registration, cancellation and deregistration or apprenticeship programs and of apprenticeship agreements; the recognition of a State agency as the appropriate agency for registering local apprenticeship programs for certain Federal purposes; and matters relating thereto.

§ 29 C.F.R. § 29.2(e):

Apprentice shall mean a worker at least 16 years of age, except where a higher minimum age standard is otherwise fixed by law, who is employed to learn a skilled trade as defined in § 29.4 under standards of apprenticeship fulfilling the requirements of § 29.5.

29 C.F.R. § 29.3:

Eligibility and procedure for Bureau registration of a program.

(a) Eligibility for various Federal purposes is conditioned upon a program's conformity with apprenticeship program standards published by the Secretary of Labor in this part. For a program to be determined by the Secretary of Labor as being in conformity with these published standards the program must be registered with the Bureau or registered with and/or approved by a State Apprenticeship Agency or Council recognized by the Bureau. Such determination by the Secretary is made only by such registration.

(b) No apprenticeship program or agreement shall be eligible for Bureau registration unless (1) it is in conformity with the requirements of this part and the training is in an apprenticeable occupation having the characteristics set forth in § 29.4 herein, and (2) it is in conformity with the requirements of the Department's regulation on "Equal Employment Opportunity in Apprenticeship and Training" set forth in 29 CFR part 30, as amended.

(c) Except as provided under paragraph (d) of this section, apprentices must be individually registered under a registered

program. Such registration may be effected:

(1) By filing copies of each apprenticeship agreement; or

(2) Subject to prior Bureau approval, by filing a master copy of such agreement followed by a listing of the name, and other required data, of each individual when apprenticed.

(d) The names of persons in their first 90 days of probationary employment as an apprentice under an apprenticeship program registered by the Bureau or a recognized State Apprenticeship Agency, if not individually registered under such program, shall be submitted immediately after employment to the Bureau or State Apprenticeship Agency for certification to establish the apprentice as eligible for such probationary employment.

(e) The appropriate registration office must be promptly notified of the cancellation, suspension, or termination of any apprenticeship agreement, with cause for same, and of apprenticeship completions.

(f) Operating apprenticeship programs when approved by the Bureau shall be accorded registration evidenced by a Certificate of Registration. Programs approved by recognized State Apprenticeship Agencies shall be accorded registration and/or approval evidenced by a

similar certificate or other written indicia. When approved by the Bureau, national apprenticeship standards for policy or guideline use shall be accorded certification, evidenced by a similar certificate or other written indicia. When approved by the Bureau, national apprenticeship standards for policy or guideline use shall be accorded certification, evidenced by a certificate attesting to the Bureau's approval.

(g) Any modification(s) or change(s) to registered or certified programs shall be promptly submitted to the registration office and, if approved, shall be recorded and acknowledged as an amendment to such program.

(h) Under a program proposed for registration by an employer or employers' association, where the standards, collective bargaining agreement or other instrument, provides for participation by a union in any manner in the operation of the substantive matters of the apprenticeship program, and such participation is exercised, written acknowledgement of union agreement or no objection to the registration is required. Where no such participation is evidenced and practiced, the employer or employers' association shall simultaneously furnish to the union, if any,

which is the collective bargaining agent of the employees to be trained, a copy of its application for registration and of the apprenticeship program. The registration agency shall provide a reasonable time period of not less than 30 days nor more than 60 days for receipt of union comments, if any, before final action on the application for registration and/or approval.

(i) Where the employees to be trained have no collective bargaining agent, an apprenticeship program may be proposed for registration by an employer or group of employers.

29 C.R.F. § 29.4:

Criteria for apprenticeable occupations.

An apprenticeable occupation is a skilled trade which possesses all of the following characteristics:

(a) It is customarily learned in a practical way through a structured, systematic program of on-the-job supervised training.

(b) It is clearly identified and commonly recognized throughout an industry.

(c) It involves manual, mechanical or technical skills

and knowledge which require a minimum of 2,000 hours of on-the-job work experience.

(d) It requires related instruction to supplement the on-the-job training.

29 C.F.R. § 29.5:

Standards of Apprenticeship

An apprenticeship program, to be eligible for registration/approval by a registration/approval agency, shall conform to the following standards:

(a) The program is an organized, written plan embodying the terms and conditions of employment, training, and supervision of one or more apprentices in the apprenticeable occupation, as defined in this part, and subscribed to by a sponsor who has undertaken to carry out the apprentice training program.

(b) The program standards contain the equal opportunity pledge prescribed in 29 CFR 30.3(b) and, when applicable, an affirmative action plan in accordance with 29 CFR 30.4, a selection method authorized in 29 CFR 30.5, or similar requirements expressed in a State Plan for Equal Employment Opportunity in Apprenticeship adopted pursuant to 29 CFR part 30 and approved by the

Department, and provisions concerning the following:

(1) The employment and training of the apprentice in a skilled trade;

(2) A term of apprenticeship, not less than 2,00 hours of work experience, consistent with training requirements as established by industry practice;

(3) An outline of the work processes in which the apprentice will receive supervised work experience and training on the job, and the allocation of the approximate time to be spent in each major process;

(4) Provision for organized, related and supplemental instruction in technical subjects related to the trade. A minimum of 144 hours for each year of apprenticeship is recommended. Such instruction may be given in a classroom through trade or industrial courses or by correspondence courses of equivalent value, or other forms of self-study approved by the registration/approval agency.

(5) A progressively increasing schedule of wages to be paid the apprentice consistent with the skill acquired. The entry wage shall be not less than the minimum wage prescribed by the Fair Labor Standards Act, where applicable, unless a higher wage is required by other applicable

Federal law, State law, respective regulations, or by collective bargaining agreement;

(6) Periodic review and evaluation of apprentice's progress in job performance and related instruction; and the maintenance of appropriate progress records;

(7) The numeric ratio of apprentices to journeymen consistent with proper supervision, training, safety, and continuity of employment, and applicable provisions in collective bargaining agreements, except where such ratios are expressly prohibited by the collective bargaining agreements. The ratio language shall be specific and clear as to application in terms of jobsite, work force, depart ment or plant;

(8) A probationary period reasonable in relation to the full apprenticeship term, with full credit given for such period toward completion of apprenticeship;

(9) Adequate and safe equipment and facilities for training and supervision, and safety training for apprentices on the job and in related instruction;

(10) The minimum qualifications required by a sponsor for persons entering the apprenticeship program, with an eligible starting age not less than 16 years;

(11) The placement of an apprentice under a written apprenticeship agreement as required by the State apprenticeship law and regulation, or the Bureau where no such State law or regulation exists. The agreement shall directly, or by reference, incorporate the standards of the program as part of the agreement;

(12) The granting of advanced standing or credit for previously acquired experience, training, or skills for all applicants equally, with commensurate wages for any progression step so granted;

(13) Transfer of employer's training obligation when the employer is unable to fulfill his obligation under the apprenticeship agreement to another employer under the same program with consent of the apprentice and apprenticeship committee or program sponsor;

(14) Assurance of qualified training personnel and adequate supervision on the job;

(15) Recognition for successful completion of apprenticeship evidenced by an appropriate certificate;

(16) Identification of the registration agency;

(17) Provision for the registration, cancellation and deregistration of the program; and requirement for the prompt

submission of any modification or amendment thereto;

(18) Provision for registration of apprenticeship agreements, modifications, and amendments; notice to the registration office of persons who have successfully completed apprenticeship programs; and notice of cancellations, suspensions and terminations of apprenticeship agreements and causes therefor;

(19) Authority for the termination of an apprenticeship agreement during the probationary period by either party without stated cause;

(20) A statement that the program will be conducted, operated and administered in conformity with applicable provisions of 29 CFR part 30, as amended, or a state EEO in apprenticeship plan adopted pursuant to 29 CFR part 30 and approved by the Department;

(21) Name and address of the appropriate authority under the program to receive, process and make disposition of complaints;

(22) Recording and maintenance of all records concerning apprenticeship as may be required by the Bureau of recognized State Apprenticeship Agency and other applicable law.

Okla. Stat. tit 40 § 196.1:

Public Policy

> It is hereby declared to be the policy of the State of Oklahoma that wage of no less than the prevailing hourly rate of wages for work of a similar character in the locality in which the work is performed shall be paid to all workmen employed by or on behalf of any public body engaged in public works exclusive of maintenance work.

Okla. Stat. tit 40 § 196.2(9);

> "Apprentice" or "Trainee" means a workman in a craft or trade who is approved for participation in an apprenticeship or trainee program approved by the Bureau of Apprenticeship and Training of the United States Department of Labor;

Okla. Stat. tit 40 § 196.10a:

Employment of Registered Apprentices and Trainees

> Nothing in this act shall prevent the employment of registered apprentices or trainees as defined in Section 196.2 of Title 40 of the Oklahoma Statutes.

Rule 7 of the Oklahoma Commissioner of Labor's Minimum Wage on Public Works Rules:

Journeyman's rate of pay will be paid to all workers employed on prevailing wage projects except "Apprentices" or "Trainees" enrolled and participating in "Apprentice" or "Trainee" programs registered with the U.S. Department of Labor's Bureau of Apprenticeship and Training.

Each apprentice or trainee employed on a contract subject to the provisions of the Prevailing Wages on Public Works Law, must be individually registered with the U.S. Department of Labor, Bureau of Apprenticeship and Training, and must be paid at the percentage of the basic hourly rate of wages on the project prevailing wage scale specified in the program for his/her level of progress. Any such employee listed on the payroll at a "Trainee" or "Apprenticeship" rate of pay, who is not registered by the Bureau of Apprenticeship and Training, must be paid the wage rate issued by the Department of Labor for the craft or classification of work actually performed. Federally approved apprenticeship or trainee standards and indenture agreements will be presented upon request.

Rule 8 of the Oklahoma Commissioner of Labor's Minimum Wage of Public Works Rules:

> "Helper" as a classification of work shall not be recognized by the Oklahoma Department of Labor.

29 C.F.R. § 29.12(a):

> **Recognition of State agencies**
>
> The Secretary's recognition of a State Apprenticeship Agency or Council (SAC) gives the SAC the authority to determine whether an apprenticeship program conforms with the Secretary's published standards and the program is, therefore, eligible for those Federal purposes which require such a determination by the Secretary. Such recognition of a SAC shall be accorded by the Secretary upon submission and approval of the following:

Supreme Court, U.S.
FILED
OCT 2 1992
OFFICE OF THE CLERK

(3)

No. 92-150

In The

Supreme Court of the United States

October Term, 1992

DEAN H. CALHOON, as Commissioner of the Department of Labor for the State of Oklahoma; and THE DEPARTMENT OF LABOR FOR THE STATE OF OKLAHOMA,

Petitioners,

-against-

NATIONAL ELEVATOR INDUSTRY, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CHARLES O. STRAHLEY, ESQ.
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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether, as held by the Tenth Circuit, the *Employee Retirement Income Security Act* preempts the action of a State Commissioner of Labor in requiring the restructuring of a nationwide, collectively bargained, multi-employer, trusteed educational program for employees into an apprenticeship program as a prerequisite for paying certain employees at the wage rate established for such employees pursuant to the terms of a nationwide, multi-employer collective bargaining agreement.[1]

Respondent National Elevator Industry, Inc., respectfully submits that, as shown by the decision of the Tenth Circuit, the question presented should be answered in the affirmative based upon the prior decisions of this Court, and this Court should therefore deny the petition for a writ of certiorari.

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[1] In the Court below, National Elevator Industry, Inc. argued that the action of the Oklahoma State Commissioner of Labor was also preempted by the *National Labor Relations Act* ("NLRA"). The Court below declined to address the preemption question related to the NLRA because the Court below found ERISA preemption. (Appendix, 30) Accordingly, the NLRA preemption question is not ripe for consideration by this Court.

PARTIES TO THE PROCEEDINGS

The Respondent is National Elevator Industry, Inc. (hereinafter called "NEII").

NEII is a non-profit membership corporation organized under the Membership Corporation Law of the State of New York.

NEII represents employers engaged in the business of constructing, modernizing, repairing and servicing elevators, escalators, moving walkways and similar devices for third-party customers such as general construction contractors, building owners and building agents in every State of the United States.

One of NEII's principal purposes is to negotiate and administer a nationwide collective bargaining agreement which governs the wages, hours and working conditions of the elevator constructor mechanics and helpers employed by the employers that are members of NEII at building construction sites and at existing buildings in every State of the United States. For over seventy years, NEII and its predecessors have negotiated a series of five-year nationwide collective bargaining agreements with the International Union of Elevator Constructors (hereinafter called the "IUEC").

NEII has no parent or subsidiary corporation. However, consonant with Supreme Court Rule 29.1, the names and cities of the principal offices of the business

organizations which NEII represents as either a general or special NEII member are listed in the footnote.[2]

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[2] Armor Elevator, Co., Louisville, Kentucky; Bay State Elevator Co., Inc., Springfield, Massachusetts; Capital Elevator Service Co., Columbus, Ohio; Carter Elevator Company, Inc., Sioux Falls, South Dakota; Courion Industries, Inc., St. Louis, Missouri; Dover Elevator Corp., Memphis, Tennessee; Eastern Elevator Company, Inc., New Haven, Connecticut; Elevator Sales & Service, Inc., Dalton, Massachusetts; Elevators, Inc., Columbus, Ohio; ESCO Elevators, Inc., Fort Worth, Texas; Futjitec America, Inc., Lebanon, Ohio; Gallagher Elevator Company, Inc., Buffalo, New York; General Elevator Company, Inc., Baltimore, Maryland; Hollister Whitney Elevator Corp., Quincy, Illinois; Independent Elevator Company, Kalamazoo, Michigan; Liberty Elevator Corporation, Paterson, New Jersey; Marshall Elevator Company, Pittsburgh, Pennsylvania; Midstate Elevator Company, Syracuse, New York; Millar Elevator Service Co., Holland, Ohio; Montgomery Elevator Company, Moline, Illinois; O'Keefe Elevator Company, Inc., Omaha, Nebraska; Otis Elevator Company, Farmington, Connecticut; F. S. Payne Company, Cambridge, Massachusetts; Powers Elevator Company, Lexington, Kentucky; Schnidler Elevator Corp., Morristown, New Jersey; Schumacher Elevator Company, Denver, Iowa; Seelar Elevator, Inc., Erie, Pennsylvania; Serge Elevator Company, Woodridge, New Jersey.

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No. 92 - 150

In The

Supreme Court of the United States

October Term, 1992

DEAN H. CALHOON, as Commiss oner of the Department of Labor for the State of Oklahoma; and THE DEPARTMENT OF LABOR FOR THE STATE OF OKLAHOMA,

Petitioners,

-against-

NATIONAL ELEVATOR INDUSTRY, INC.,

Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

COUNTERSTATEMENT OF THE CASE

At any given time, there are hundreds, sometimes thousands, of job sites throughout the United States at which elevator constructor mechanics ("mechanics") and el-

evator constructor helpers ("helpers") work in "teams," installing new elevators in a building under construction. Elevator constructor work has been performed by such "teams" in this manner for a least seventy years. Elevator mechanics and helpers also work in "teams" in repairing and modernizing elevators in existing buildings.

The wages, hours and working conditions of virtually all of the mechanics and helpers performing this work on a nationwide basis, including the State of Oklahoma, are determined pursuant to a nationwide collective bargaining agreement negotiated by the International Union Elevator Constructors ("IUEC") and National Elevator Industry, Inc. ("NEII"). For more than seventy years these collective bargaining agreements have provided that elevator construction, repair and modernization work is to be performed by a "team" (or "teams"), each such "team" consisting of one mechanic and one helper. It is undisputed that virtually all such elevator work performed throughout the United States, including such work in the State of Oklahoma, is actually performed by such teams pursuant to the nationwide collective bargaining agreement.

Prior to 1967, the system for training helpers in the skills needed for advancement to the position of mechanic in the elevator industry operated on a city by city basis. These locally operated training systems were unsatisfactory to both NEII and the IUEC for several reasons, including the fact that the quality and type of training provided to helpers was not uniform from city to city and, because the use of sophisticated electronic controls was rapidly evolving in the elevator industry, a more professional approach was needed to train helpers.

In collective bargaining in 1967, NEII and the IUEC agreed to establish a nationwide educational program known as the National Elevator Industry Educational Program ("NEIEP"). NEIEP is commonly known as a "Taft-Hartley Trust," that is, a trust organized pursuant to the *Labor-Management Relations Act*, 29 U.S.C. § 302. As such, NEIEP is governed by a board of trustees, one half of whom are appointed by NEII and the other half of whom are appointed by the IUEC.

As the Tenth Circuit found, it is undisputed that NEIEP is also an employee benefit plan within the meaning of the *Employee Retirement Income Security Act*, 29 U.S.C. § 1001, *et seq.* ("ERISA"). (Appendix, pp. 8, 9)

From its beginning, NEIEP has sought to achieve, and has achieved, a high level of excellence in the educational programs it makes available to helpers employed by contributing employers in the elevator industry. The record in the courts below contains substantial documentary evidence concerning NEIEP. In summary, NEIEP is well funded, based upon employer contributions for every hour of work in the elevator industry on a nationwide basis. NEIEP is available to every helper employed by a contributing employer in the elevator industry without the payment of any tuition by the helper. NEIEP has its principal office in North Attleboro, Massachusetts but hires instructors to conduct classes on a regular on-going basis in more than 71 cities throughout the United States, including Tulsa and Oklahoma City. NEIEP has a home study program for helpers who may find it inconvenient to attend classes. NEIEP furnishes high quality books and manuals

to the helpers enrolled in NEIEP and provides other training aids such as high quality video instructional tapes and experimental electronic labs. The NEIEP office in North Attleboro has toll-free telephone lines by means of which helpers can talk directly to instructors as often as the helpers wish to do so. NEIEP enrolls helpers in a course of study which ordinarily requires three or four years to complete but which is flexible and permits a helper to complete his or her studies in a longer or shorter period of time. NEIEP provides for a uniform level of excellence of instruction on a nationwide basis by carefully monitoring the performance of the instructors who conduct the classes throughout the United States. NEIEP provides for complete portability of educational credits on a nationwide basis. Both of these latter features are important to the elevator industry where employees are not infrequently sent to job sites far removed from their home cities. NEIEP conducts its examinations under stringently monitored conditions, and is in compliance with all laws relating to equal employment opportunities for all helpers regardless of race, color, creed, national origin, sex, age or other arbitrary considerations unrelated to the competence and ability of helpers to perform work.

Although NEIEP is an educational program, NEIEP is *not* an apprenticeship program and does *not purport* to be an apprenticeship program, which is typically controlled at a local level and subject to the abuses of nepotism and haphazard instructional and testing procedures. Apprenticeship programs are also typically characterized by inflexible schedules for completion of the apprenticeship, in contrast to NEIEP, which permits a helper to learn at the pace

best suited for the helper.

Most elevator work is performed for private, non-governmental, parties such as general contractors, building owners or building agents. However, some of the work is performed by elevator companies for the federal government and some of the work is performed by elevator companies for the various States or political subdivisions thereof.

Under the nationwide collective bargaining agreement, the wage rates for mechanics and helpers in different geographic areas change from time to time, approximately once a year. As part of the regular routine, NEII gathers information concerning the current wage rates and hourly employee benefit costs for other unionized trades in each such geographic area. NEII then uses this information to calculate the new wage rates for elevator constructor mechanics and elevator constructor helpers employed in the same geographic area pursuant to the wage rate formula set forth in the nationwide collective bargaining agreement. NEII then notifies several interested parties of the new wage rates. Among others, NEII sends the notification to the local IUEC Union, the employers doing business in that locality, and the United States Department of Labor. The United States Department of Labor uses the information to publish in the Federal Register the new prevailing wage rates under the *Davis-Bacon Act*, 40 U.S.C. § 276(a) *et seq.* for elevator constructor mechanics and helpers in each geographic area. The United States Department of Labor has recognized the category of elevator constructor helper as a legitimate employee classification for more than 50 years. Under the *Davis-Bacon Act*,

any employer performing elevator work for the federal government must pay its elevator constructor helpers at the wage rate for such helpers, as published in the Federal Register for the geographic area in which the work is to be performed.

Most States, such as Oklahoma, have passed State prevailing wage rate laws which are similar to the *Davis-Bacon Act*. The Oklahoma prevailing wage rate law reads, in part, as follows:

> "The prevailing hourly rate of wages for this State shall be those filed in the Federal Register as determined by the U.S. Department of Labor, pursuant to the Federal Davis-Bacon Act and amendments thereto."

Okla. Stat. Title 40, § 196.6 (1991).

Sometime in early 1989, the Oklahoma Commissioner of Labor conducted audits of the payrolls of several elevator companies that had performed elevator work for Oklahoma. These audits showed that the elevator companies had paid their helpers at the wage rate for helpers which was determined pursuant to the nationwide collective bargaining agreement for the geographic area in Oklahoma and for the time in which the work was performed. The Commissioner, however, took the position that this was inadequate and that the elevator companies were required to pay helpers employed on a job performed for the State of Oklahoma at the wage rate for mechanics, rather than at the wage rate for helpers as established by the nationwide collective bargaining agreement. The Commissioner threatened, *inter alia,* to debar these companies from

bidding upon future work for Oklahoma unless the companies made immediate retroactive payments to helpers at the mechanic's wage rate. Under this threat, the elevator companies complied with the Commissioner's demand. Shortly thereafter, NEII filed with the Commissioner a petition for a declaratory ruling that the proper wage rate for helpers employed on a job performed for the State of Oklahoma was the wage rate for helpers established by the nationwide collective bargaining agreement between NEII and the IUEC for the time and for the geographic area in which the work is performed.

The Commissioner's ruling upon NEII's petition for a declaratory ruling is reprinted in the Appendix at pages 46 through 56. As relevant to the present case, the Commissioner ruled, in substance, that the Commissioner would "recognize" the elevator constructor helper only if NEIEP were reorganized in the form of an apprenticeship program.

NEII then commenced an action in the United States District Court for the Western District of Oklahoma, seeking, *inter alia*, to have the District Court vacate the Commissioner's ruling on the basis that the ruling was preempted by ERISA and the NLRA. The Commissioner moved for dismissal of NEII's complaint, which motion the District Court granted. The order of the District Court is reprinted in the Appendix at pages 31 through 45.

NEII then appealed from that portion of the decision of the District Court which held that the Commissioner's ruling was not preempted by either ERISA or the NLRA. The United States Court of Appeals for the

Tenth Circuit reversed the order of the District Court, holding that the Commissioner's ruling was preempted by ERISA. Because the Tenth Circuit found ERISA preemption, the Tenth Circuit declined to address the issue of NLRA preemption. The decision of the Court of Appeals for the Tenth Circuit is reported at 957 F.2d 1555, (10th Cir. 1992), and is reprinted in the Appendix at pages 1 through 30.

ARGUMENT

I

There Is No Conflict Between The Ninth And Tenth Circuit Courts of Appeals As Contended By Petitioners.

Petitioners contend that this Court should grant a writ of certiorari to resolve a purported conflict between the decision of the Court of Appeals for the Ninth Circuit in *Electrical Joint Apprenticeship Comm. v. MacDonald*, 949 F.2d 270 (9th Cir. 1991), *cert denied*, _____ U.S. _____, 112 S.Ct. 863 (1992) and the decision of the Court of Appeals for the Tenth Circuit in the present case. There is no such conflict.

First and foremost, the *MacDonald* case was cited by the Tenth Circuit as one of the precedents supporting the decision of the Tenth Circuit, as follows:

> In a second Ninth Circuit case, *Electrical Joint Apprenticeship Comm. v. MacDonald*, 949 F.2d 270 (9th Cir. 1991), the court considered application of Nevada statutes that allowed apprenticeship/training wages to be paid only to workers in state approved apprenticeship programs. The plaintiff had a BAT approved ERISA apprenticeship program but was required to pay the regular prevailing wage to apprentices because their plan was not approved by the state. The Ninth Circuit found this application of the Nevada prevailing wage statutes to be preempted by ERISA. *Id* at 275.

> *MacDonald* resembles the instant case because both cases involve states requiring higher wages for workers in ERISA training programs they do not approve of while allowing lower wages for workers in ERISA training programs of which they do approve.

National Elevator Industry, Inc. v. Calhoon, et al., 957 F.2d 1555 at 1559, reprinted at Appendix, pp. 16, 17.

> All the above cases dealt with apprenticeship/training programs or wages or both, and all found preemption. Although the facts of the case before us differ in some specifics from these other cases, the principles articulated do support preemption in the present case. Although wage regulation is an area of traditional state regulation, when wage regulations uniquely affect ERISA plans and involve the state in imposing requirements upon such plans, preemption will be found.

National Elevator Industry, Inc. v. Calhoon, et al., supra, at 1560, reprinted at Appendix, p. 21.

Based upon the foregoing, it is clear that the Tenth Circuit certainly did not read the decision by the Ninth Circuit in *MacDonald, supra,* as a decision in conflict with its decision in the present case. On the contrary, the Tenth Circuit clearly regarded the "principles articulated" by the Ninth Circuit in *MacDonald, supra,* and by the Second and Eighth Circuits in other cases,[3] to "support

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[3] *Hydrostorage, Inc. v. Northern Cal. Boilermakers Local*

preemption in the present case."

In an effort to create the appearance of a conflict, Petitioners attempt to twist the meaning of the Ninth Circuit's decision in *MacDonald, supra,* by a highly selective presentation of quotations from the decision. Petitioners quote the first sentence of a two-sentence paragraph from the *MacDonald* decision, omitting the second sentence which should obviously be read in context with the first sentence, and which is more directly relevant to the issues in the present case than the first sentence. (Petitioners' Brief, p. 25) Thus, in the paragraph partially quoted by Petitioners, the Ninth Circuit noted:

> There is no exemption from the broad preemption provision of section 514(a) of ERISA except for the federal Fitzgerald Act and the regulations issued thereunder. 29 U.S.C. § 1144. *Thus, any state regulation of apprenticeship programs that is separate and apart from the authorization given by the Fitzgerald Act and its accompanying regulations is preempted by section 514(a) of ERISA. Id.*

MacDonald, supra, at 274. Emphasis supplied.

Section 50 of the *National Apprenticeship Act* (popularly known as the *Fitzgerald Act,* 29 U.S.C. § 50),

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Joint Apprenticeship Committee, 891 F.2d 719 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 111 S.Ct. 72 (1990); *General Electric Co. v. New York State Department of Labor*, 891 F.2d 25 (2d Cir. 1989), *cert. denied*, 496 U.S. 912 (1990); *Boise Casade Corp. v. Peterson*, 939 F.2d 632 (8th Cir. 1991), *cert. denied, sub. nom., Lemmes v. Boise Cascade Corp.*, ___ U.S. ___, 112 S.Ct. 863 (1992).

reads, in its entirety, as follows:

> The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Office of Education under the Department of Health, Education, and Welfare in accordance with section 17 of Title 20. For the purposes of this Chapter, the term "State" shall include the District of Columbia.

In Section III of its decision in the present case, the Tenth Circuit carefully addressed the Petitioners' argument that the general savings clause in ERISA, 29 U.S.C. § 1144(d), saves the ruling of the Oklahoma Commissioner from preemption. The Tenth Circuit rejected the Petitioners' argument that the Commissioner was acting pursuant to powers delegated to him under the *Fitzgerald Act*, 29 U.S.C. § 50. Again, in this section of its opinion dealing with the general savings clause in ERISA, the Tenth Circuit expressly cited the Ninth Circuit's decision in *MacDonald* as a precedent supporting its decision. The decision of the Tenth Circuit reads, in part, as follows:

> Section 50 does not depend upon states to enforce its provisions; in fact,

> there is nothing in § 50 for states to enforce, (Footnote omitted.) Section 50 merely seeks to facilitate development of apprenticeship programs - - it does not mandate apprenticeship programs or seek to discourage other training programs (Footnote quoted below.) *We agree with the Ninth Circuit that* "the regulations relate only to eligibility for federal registration. Neither they nor the Act [§ 50] itself contemplate enforcement mechanisms...." *Hydrostorage,* 891 F.2d at 731 (citing and adopting the district court's analysis, 685 F. Supp. 718, 722 (N.D. Cal. 1988); *see also MacDonald,* 949 F.2d at 274 n.3 (ERISA "does not permit independent state regulation" under § 50). Therefore, defendants' ruling simply cannot be said to function as an enforcement mechanism for § 50. We decline to make § 1144(d) into an expansive savings clause; we hold that the savings clause of § 1144(d) does not save the defendants' ruling from ERISA preemption. *See Hydrostorage,* 891 F.2d at 731-32 (state law encouraging apprenticeship programs not saved from ERISA preemption by § 1144(d)); *MacDonald,* 949 F.2d at 275 (wage law favoring state apprenticeship programs not saved from ERISA preemption).

National Elevator Industry, Inc. v. Calhoon, et. al., supra, at 1562 reprinted at Appendix, pp. 27, 28, 29, emphasis supplied.

The footnote to the first sentence quoted above

sets forth the text of 29 U.S.C. § 50. The footnote to the second sentence reads as follows:

> The federal government does not discourage the NEIEP with a prohibitive wage structure as defendants seek to do. The U.S. Department of Labor recognizes the helper category and allows the lower wage rate for helpers on federal public works projects in Oklahoma. *See* United States Dep't of Labor, General Wage Decision No. OK88-18.

National Elevator Industry, Inc. v. Calhoon, *supra*, at 1562, reprinted at Appendix, p. 28.

Thus, the Tenth Circuit clearly found that the Oklahoma Commissioner of Labor was not acting pursuant to any power delegated to him by the *Fitzgerald Act*, notwithstanding his claim to the contrary. In *MacDonald*, the Ninth Circuit found that, notwithstanding his claim to the contrary, the Nevada Commissioner of Labor was not acting pursuant to any power delegated to him pursuant to the *Fitzgerald Act*. *MacDonald*, *supra*, at 274. As noted by both the Ninth and Tenth Circuits, nothing contained in the *Fitzgerald Act* mandates the establishment of an apprenticeship program under any circumstances. As noted by both the Ninth and Tenth Circuits, the *only* power delegated by the *Fitzgerald Act* to the states is the power to determine whether an apprenticeship program which seeks governmental approval as an apprenticeship program meets the standards required for such approval under the federal regulations issued pursuant to the *Fitzgerald Act*.

In the instant case, NEIEP is *not* an apprentice-

ship program, does *not purport* to be an apprenticeship program, and is *not seeking* certification by either the United States Department of Labor or the State of Oklahoma as an apprenticeship program. NEIEP is a multi-employer educational program established through nationwide collective bargaining between NEII and the IUEC for employees in the elevator industry. NEIEP is administered by a board of Trustees appointed by NEII and the IUEC pursuant to Section 302 of the *Labor Management Relations Act*, 29 U.S.C. § 302. As noted by the Tenth Circuit, it is undisputed that NEIEP is an "employee benefit plan" within the meaning of ERISA, Section 1002(1), (Appendix, p. 8).

The record before the Commissioner, which is part of the record in the Courts below, contains a full description of NEIEP. The Oklahoma Commissioner of Labor has never in any way disputed NEII's claim that the education which NEIEP affords to helpers in the elevator industry is at least the equal of, and in most respects far superior to, the education afforded to apprentices in other industries by locally controlled apprenticeship committees. The *only* objection expressed by the Oklahoma Commissioner is to *form* of NEIEP, that is, the Commissioner objects to the fact the NEIEP is not structured as an apprenticeship program (which is typically controlled at a local level, rather than operated on a nationwide basis).

As shown above, the Tenth Circuit correctly held that the *Fitzgerald Act* does not delegate any power to the Oklahoma State Commissioner to compel any modification of NEIEP so that it is converted to an apprenticeship program. While the *Fitzgerald Act* generally encourages the

establishment of apprenticeship programs, as noted by the Tenth Circuit, there is nothing in the *Fitzgerald Act* which is intended to discourage other types of educational programs such as NEIEP.

In summary, there is nothing in *McDonald, supra*, which is in conflict with the rationale or the result in the instant case. In *McDonald*, the Nevada Commissioner of Labor refused to "recognize" an appreticeship program which had already received federal approval by the United States Department of Labor. The action of the Oklahoma Commissioner of Labor in the instant case mirrors the action of the Nevada Commissioner in *McDonald* in that both Commissioners required "higher wages for workers in ERISA training programs which they do not approve of while allowing lower wages for workers in ERISA training programs that they do approve of." *National Elevator Industry, Inc. v. Calhoon, supra*, at 1560.

The Petitioners herein seek to create the appearance of a conflict by arguing, in effect, that *McDonald* stands only for the proposition that action taken by a state commissioner acting pursuant to power delegated to the commissioner under the *Fitzgerald Act* would not be preempted by ERISA because ERISA does not preempt other federal laws or state action "upon which federal laws depend for their enforcement," within the meaning of *Shaw v. Delta Airlines*, 465 U.S. at 104.

As shown above, neither the instant case nor the *McDonald* decision involves any state action upon which the *Fitzgerald Act* depends for enforcement.

II

The Petitioners' Contention That The Commissioner Was Seeking To Further The Federal Policies Underlying The Fitzgerald Act Is A Post Hoc Rationalization By Petitioners' Counsel.

All of the foregoing argument concerning the applicability of the *Fitzgerald Act* is far removed from the realities underlying the Oklahoma Commissioner's actions in the instant case. The contention that the Oklahoma Commissioner was seeking to further the federal policies embodied in the *Fitzgerald Act* is strictly the *post hoc* rationalization of the Petitioners' counsel to attempt to clothe the Commissioner's action with some legitimate purpose. The *Fitzgerald Act* was never mentioned by the Oklahoma Commissioner in his response to NEII's request for a declaratory ruling. (Appendix, pp. 46 through 56). Further, the State of Oklahoma has shown so little interest in the encouragement of apprenticeship programs that, at least up to the date of oral argument before the Tenth Circuit, the State of Oklahoma had not even registered under the regulations issued pursuant to the *Fitzgerald Act* as a state authorized to approve the qualifications of apprenticeship programs that seek certification under the *Fitzgerald Act*, 29 C.F.R. § 29.12(a), reprinted in part at Appendix p. 73.

Counsel's *post hoc* rationalization aside, the Oklahoma Commissioner chose to ignore the long history of collective bargaining in the elevator industry relating to the employment of helpers in "teams" with mechanics simply because there is a prejudice against the employment of helpers in the construction industry. It is respectfully sub-

mitted that the Oklahoma Commissioner demanded the restructuring of NEIEP into an apprenticeship program solely to create an obstacle to the employment of helpers in the elevator industry, the Commissioner fully expecting that it would not be feasible or desirable for NEII to disrupt a nationwide educational plan to carve out a different kind of educational program for Oklahoma. The Commissioner's actions run directly counter to the national policy embodied in ERISA to protect employee benefit plans from "the threat of conflicting and inconsistent State and local regulations." (Remarks of Representative Dent with respect to the broad scope of ERISA preemption, 120 Cong. Rec. 29197 (1974), quoted by this Court in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 at 98 (1983)).

The Oklahoma Commissioner was clearly willing to sacrifice the substantial benefits to helpers of a nationwide, collectively bargained, trusteed, high quality employee benefit plan to appease certain elements of his constituency in Oklahoma, but his actions were, as found by the Tenth Circuit, preempted by ERISA.[4]

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[4] The Commissioner's ruling also adversely affects the interests of the State of Oklahoma. The bids for elevator construction work are based in significant part upon the bidder's estimate of labor costs. NEII advised the Commissioner in writing in NEII's request for a declaratory ruling that prohibiting the use of helpers in "teams" with mechanics would result in additional costs to the State of Oklahoma in the range of 17% to 33% higher than the costs to a private party or to the federal government *for exactly the same work in the State of Oklahoma*. If upheld, the Commissioner's ruling, purportedly construing the Oklahoma *Prevailing Wage Rate* law,

III

Petitioners' Brief Misstates NEII's Argument In The Courts Below.

At page 23 of their Brief, footnote 1, Petitioners incorrectly state that "throughout this proceeding, NEII has argued that, under *Shaw*,[5] the fact that the United States Department of Labor has recognized the lower helper wage rate in federal public works projects requires states to do so as well." NEII never made this argument in the lower courts and disavows any such argument in this Court.

NEII does not believe that Petitioners' misstatement of NEII's argument is crucial to the Court's consideration of the petition because the decision of the Tenth Circuit speaks for itself. NEII merely calls the Court's attention to Petitioners' misstatement pursuant to Rule 15.1 of the Rules of the Supreme Court.

Petitioners have not specified the basis for its misstatement and NEII knows of no such basis.

In the Courts below, NEII made only one statement concerning the Commissioner's legal compulsion to

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would cause the State of Oklahoma to pay in the range of 17% to 33% more than the amount which would be paid by a private party or the federal government *for the same work in Oklahoma.* Such a bizarre result, which is in irreconcilable conflict with the most fundamental aim of a *prevailing wage rate* law, strongly suggests that the Commissioner had some other agenda uppermost in mind in making his ruling.

[5] *Shaw v. Delta Airlines,* 463 U.S. 85 (1983).

recognize the wage rate for an elevator constructor helper. NEII argued that, *under Oklahoma law*,[6] the Commissioner should have found the prevailing wage rate for an elevator constructor helper to be the wage rate for an elevator constructor helper as published in the Federal Register.

In the Court below, NEII also contrasted the Petitioners' claim that the Commissioner was merely seeking to foster the federal policies embodied in the *Fitzgerald Act* with the fact that the Commissioner's ruling was totally inconsistent with the long standing recognition of the category of helper by the United States Department of Labor. Pointing out this glaring inconsistency in the State's position is hardly an argument that federal law, as interpreted by this Court in *Shaw*, requires the states to recognize the category of elevator constructor helpers.

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[6] Title 40, Oklahoma Statutes, § 196.6, provides, in relevant part, that "the prevailing hourly rate of wages for this state shall be those filed in the Federal Register as determined by the U.S. Department of Labor, pursuant to the Federal Davis-Bacon Act and amendments thereto."

IV

There Is No Policy Reason For Granting The Petition For A Writ Of Certiorari.

In reaching its decision in the instant case, the Tenth Circuit relied upon the principles articulated in four decisions issued by the Second, Eighth and Ninth Circuit Courts of Appeals, each of which involved ERISA preemption of various state actions purportedly based upon a State's prevailing wage rate law. The Supreme Court has denied a writ of certiorari in each of these cases. *Hydrostorage, Inc. v. Northern Cal. Boilermakers Local Joint Apprenticeship Committee*, 891 F.2d 719 (9th Cir. 1989), *cert. denied*, _____ U.S. _____, 111 S.Ct. 72 (1990); *General Electric Co. v. New York State Department of Labor*, 891 F.2d 25 (2d Cir. 1989), *cert. denied*, 496 U.S. 912 (1990); *Boise Cascade Corp. v. Paterson*, 939 F.2d 632 (8th Cir. 1991), *cert. denied, sub nom., Lemmes v. Boise Cascade Corp.*, _____ U.S. _____, 112 S.Ct. 863 (1992); *Electrical Joint Apprenticeship Comm. v. MacDonald*, 949 F.2d 270 (9th Cir 1991), *cert. denied*. _____ U.S. _____, 112 S.Ct. 2991 (1992).

Including the decision of the Tenth Circuit in the instant case, four Circuit Courts have now reached consistent results in five cases involving the interplay of ERISA preemption and the actions of State officials purportedly acting under the authority of State prevailing wage rate laws and/or the *Fitzgerald Act*. More importantly, the results in these five cases have been based upon the same general rationale in applying the decisions of this

Court to the slightly differing sets of facts in each case involving the State prevailing wage rate laws. Under these circumstances, it seems clear that the many prior decisions of this Court relating to ERISA preemption in other contexts[7] have been more than sufficient to guide the Courts of Appeals in deciding ERISA preemption questions in the context of State prevailing wage rate statutes.

In the instant case, the Tenth Circuit identified the most difficult issue as the issue whether the Commissioner's ruling "relates to" NEIEP. *National Elevator Industry, Inc. v. Calhoon, et. al., supra,* at 1558, Appendix p. 10. After a careful review of the legal standards to be applied by the Courts in determining whether a State law or State action "relates to" an ERISA plan, the Tenth Circuit concluded that the ruling of the Oklahoma Commissioner herein did in fact "relate to" NEIEP because the Commissioner's re-

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[7] *Ingersoll-Rand Co. v. McClendon*, _____ U.S. _____, 111 S.Ct. 478 (1990); *FMC Corp. v. Holliday*, _____ U.S. _____, 111 S. Ct. 403 (1990); *Massachusetts v. Morash*, 490 U.S. 107, (1989); *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988); *Fort Halifax Packing Co., Inc. v. Coyne, Director, Bureau of Labor Standards of Maine*, 482 U.S. 1 (1987); *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metropolitan Life Insurance Co. v. Taylor*, 471 U.S. 724 (1985); *Brown v. Hotel & Restaurant Employees & Bartenders International Union Local 54*, 468 U.S. 491 (1984); *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1 (1983); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 904 (1981); *Malone v. White Motor Corp.*, 435 U.S. 497 (1978).

quirement that NEIEP be restructured as an apprenticeship plan as a condition to "recognition" of the elevator helper "uniquely affected" NEIEP and was not "tenuous, remote or peripheral". *National Elevator Industry, Inc. v. Calhoon, et. al., supra,* at 1560; Appendix, p. 21. The clarity and thoroughness of the Tenth Circuit's opinion on this point speaks volumes concerning the lack of necessity for this Court to issue a writ of certiorari.

CONCLUSION

For The Reasons Set Forth Above, The Court Should Deny The Petition For A Writ Of Certiorari.

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September 24, 1992

Respectfully submitted,

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